HOTEL DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES, PARIS

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Bering Sea Tribunal of Arbitration

# REPORT OF THE PROCEEDINGS

OF THE

# TRIBUNAL OF ARBITRATION

CONVENED AT PARIS, 1893

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## PART II

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12TH - 18TH APRIL

dence in the documents and papers previously delivered to the Arbitrators, be not now received, with liberty, however to Counsel to adopt such document, dated January 31st, 1893, as part of their oral argument, if they deem proper. The question as to the admissibility of the documents, or any of them, constituting the appendices attached to the said document of January 31st, 1893, is reserved for further consideration, without prejudice of the right of Counsel, on either side, to discuss that question, or the contents of the appendices, in the course of the oral argument ".

**Sir Charles Russell.** — I should like in connection with the order of Tribunal to express again what we have already expressed in writing. namely, our readiness to hand a copy of a the " Supplementary Report " to the Counsel for the United States, without prejudice to their position, or without prejudice to any right which they have or conceive they have in relation to the future admissibility of the documents refered to in the appendices.

**The President.** — You may do as you like about that. If the gentlemen like to receive it they are free to. If you like to adopt it into your oral argument then it will be a part of your oral argument and the gentlemen opposite then will not have any reason not to receive it.

**Mr Justice Harlan.** — Of course the United States Counsel ought to see it now in order to examine the appendices.

**Si Charles Russell.** — Certainly.

**Mr Phelps.** — We shall accept the proposal of my learned friend and be glad to receive copies.

**Sir Charles Russell.** — The Tribunal will recollect that we made the offer at the time the document was originally produced.

**The President.** — You did. I will now read the second order in the argument proposed by Mr Phelps at the end of the last sitting. The second motion which had been proposed after the first had been argued.

" Le Tribunal décide qu'il différera, jusqu'à tel moment qui sera par lui ultérieurement indiqué, d'entendre plaider et de prendre en considération la motion présentée le 4 avril 1893, par les États-Unis d'Amérique, tendant à la radiation de certains passages faisant partie du contre-mémoire et des moyens de preuve du Gouvernement de la Grande-Bretagne ".

Then I will read that in English : " It is ordered that the argument and consideration of the motion made by the United States of America, on the 4th day of April, 1893, to strike out certain parts of the Counter-Case and proofs of the Government of Great Britain, be postponed until such time as may be hereafter indicated by the Tribunal."

Now, gentlemen, we are ready to hear you address us on the merits of the case and the principal parts of the case — we are very anxious and eager that we should enter as soon as possible into the consideration of this important matter in itself.

**Mr Carter.** — Mr President, it would be an evidence of insensibility on my part if in proceeding to open the discussion of the important question with which we are to deal —

**Sir Charles Russell.** — I beg my learned friend's pardon for one moment, but I should be very glad if he would allow me to interrupt him. It has been arranged between my learned friend Mr Phelps, and myself, with the consent of my learned friend Mr. Carter, that before the argument was opened, it should be explained to the Tribunal the course that had been agreed upon as to the order of the hearing of Counsel between my learned friend and myself, subject always to that arrangement meeting the approval of the Tribunal. It is necessary, I think, that I should make this word of explanation, because, as the Tribunal knows, the British Government is here complaining of the seizure of certain vessels, under circumstances which it alleges do not justify that seizure : and therefore in the ordinary course of things it might be thought that it lay upon Counsel for Great Britain, as the party originally complaining, to open the case. But inasmuch as the United States have admitted all the facts that would be essential to establish what lawyers call a *prima facie* case, namely, inasmuch as the facts of the seizure have been admitted, and inasmuch as the United States Government has adopted the responsibility for those seizures, it must be apparent to the Tribunal that the *prima facie* case on the part of Great Britain would be of a merely formal kind; and that therefore the United States are in a position in which they are required to justify, upon grounds consistent with law, the seizures of which complaint is here made. In those circumstances it has been agreed between us that it would be the more regular or more convenient course for my learned friends, upon whom, in the way I mention, the *onus probandi* lies, to open their case. It has been arranged that Mr Carter shall open, to be followed by Mr Coudert; that then the Counsel for Great Britain, my learned friends Sir Richard Webster and Mr Christopher Robinson, and myself shall address the Tribunal; and the ultimate reply shall rest with Mr Phelps. This arrangement being, as the Tribunal will understand, and as I have intimated, subject to such views as the Tribunal may think fit to throw out, and may suggest as convenient at any intermediate stage of the argument; and subject also, of course, to any necessity which may arise for the re-arguing of particular points.

Of course, the Tribunal will have in its mind that we have made a submission that did not directly arise on the motion disposed of as to the division of these questions. I do not intend to say anything at this moment upon that; but, if there be an attempt on the part of my learned friends to deal in argument with the question of Regulations coincidently with the previous questions, we shall have to submit that that is not a proper or a convenient course to be pursued. I beg my learned friend's pardon for having momentarily interrupted him.

**The President.** — The Tribunal is quite ready to approve of all the arrangements which Counsel find suitable to their own convenience, and the arrangement as stated by Sir Charles Russell, if agreed upon by all the other Counsel connected in the argument of this case, will be perfectly agreeable to the Tribunal. I will only state two things then, that in the

arrangement of the arguments that are to take place and in the plan and ordering of the arguments that are to take place on either side, it would be for the convenience of the Tribunal if the learned Counsel on either side were to be kind enough to keep separate the arguments on the matters relating to the legal points and the matters relating to Regulations; I mean to say, to argue the points one after the other as much as possible, — keep the five legal points separate from the question of Regulations. It would be more convenient for the Tribunal if these matters could be kept separate in the consideration which the Tribunal must have to give to them; and, consequently, it would be more convenient if Counsel were to act in accordance with this mode of proceding.

Now, Mr Carter, we are ready to proceed.

**Mr Carter.** — I was saying, Mr President, that it would be unbecoming in me in opening the discussion on the important questions with which we are to deal, if I should fail to express myself with reference to the novelty and the importance and the dignity of the occasion, and of the high character of the Tribunal which it is my privilege to address. You, Mr. President, in acknowledging the honour conferred upon you by your election to the office of President, expresed in appropriate language those aspirations and hopes which are excited and gratified by so judicial an attempt as this to remove all occasion for the employment of force between nations by a substitution of the method of reason in the settlement of controversies. I beg to express my concurrence in those sentiments. Nor should I omit a grateful recognition on the part of the United States Government, of the extreme kindness with which the Agents and Counsel, have been received; not only has this magnificent building, with all its appliances, been freely offered for the deliberations of the Tribunal itself, but every aid and assistance that we could desire have been freely extended to us. We recognise in this a fine and generous hospitality, worthy of France and her Capital, — the fair and beautiful Capital of the World.

Mr President, in reference to the statement which was made by my learned friend Sir Charles Russell, as to the order of proceeding which Counsel have agreed to adopt subject to the approval of the Tribunal, I have only this to say; we do not distinctly recognise that there is any special *onus probandi* resting on the United States to substantiate its contentions in reference to the disputed points. Those questions in our view are submitted to the Tribunal, and it is for the Counsel on either side alike equally to substantiate those contentions, — or whose view in respect of the circumstances which make it proper that the affirmative should be taken by the United States, or that they are rather the party that are seeking for the affirmative action of the Tribunal in their favour, — I have nothing more to add in reference to that; and there is no essential point of difference between us. Touching the suggestion which you, Mr President, have just made respecting the importance of observing a separation between the questions, so to speak, of right and those which

concern the question of Regulations, I shall endeavour to exactly comply with the suggestion. It will not be entirely possible altogether to separate those questions; but the direct discussion of them I shall keep entirely separate. Certain considerations concerning the question of Regulations will arise and become material and important upon the argument of the question of property; but I shall only recur to the question of Regulations in the argument of the question of property to the extent to which it seems to me that it may be material; the general and direct discussion of the question of Regulations, I shall endeavour carefully to separate from the rest of my argument.

In any discussion, Mr President, of these important questions which the Tribunal has to determine, it seems to me that it will be important in the first place that the Tribunal should have before it some sketch (as brief and concise as possible) of the subject matter of the controversy, of the particular occasions, out of which the controversy grew, and the successive steps through which it has from time to time passed until it has reached the stage at which we now find it. The learned Arbitrators will I think thus be able to breath the atmosphere, as it were, of the case and to approach the questions as the parties themselves approach them, and thus be able to better understand and appreciate the respective contentions of the two parties. This, therefore, will be my apology (if apology is needed) for endeavouring to lay before you a sketch, as concise as I shall be able to make it, of the controversy from the beginning, before proceeding to discuss the particular questions which have arisen.

The case has reference, as you are well aware, to the great fur-seal interests which are centred in Behring Sea and in the waters adjoining that sea. Those interests began to assume importance something like a century ago. During most of the eighteenth century as we are aware the efforts and ambitions of various European Nations were directed towards the taking possession of, and the settlement and colonization of, the temperate and tropical parts, so to speak, of the American continent, but in those efforts Russia seems to have taken a comparatively very small part, if any part at all. Her entreprise and ambition were directed to these Northern seas. They were seas which bordered upon coasts which in part she already possessed, the Siberian coast of Behring Sea. From that coast explorations were made by enterprising navigators belonging to that nation until the whole of Behring Sea was discovered, and the coasts on all its sides explored. The Aleutian Islands forming its southern boundary were discovered and explored, and a part of what is called the north-west coast of the American continent south of the Alaskan Peninsula, and reaching south as far as 50 or 54 degrees of latitude, was also discovered by Russian navigators and establishments were at certain places formed upon it. The great object of Russia in these enterprises and explorations was to reap for herself the sole profit and the sole benefit which could be derived from these remote and ice-bound regions, namely, that of the fur-bearing animals which inhabited them, and which were

gathered by the natives, the few natives which inhabited those regions. It was to obtain for herself the benefit of those animals and the trade with the natives who were engaged in gathering them, which constituted the main object of the original enterprise prosecuted by her navigators. They had at a very early period discovered what was called the Commander Islands on the western side of the Behring Sea, and which were then, as they are now, one of the principal resorts and breeding places of the fur seal, and they were carrying on a very large or a considerable industry in those animals on those islands. Prior to the year 1787 one of their navigators, captain Pribilof had observed very numerous bodies of fur seals making their way northwards throught the passages of the Aleutian chain. Whither they were going, he knew not, but from his knowledge of the habits of the seals on the Commander Islands, he could not but suppose that there was somewhere north of the Aleutian chain and in the Behring Sea, another great breeding place, a resort for these animals. He then expended much labour in endeavouring to discover those resorts. In the year 1787, I think on one of those voyages for that purpose, he suddenly found himself in the presence of that tremendous road — a roar almost like that of Niagara, it is said, which proceeds from the countless multitude of the animals on the islands.

He knew then that the object for which he was seeking had been attained, and waiting until the fog had lifted, he discovered himself in the presence of the islands to which his name was afterwards given. That was in 1787. Immediately following that discovery the Russians, sometimes individually, sometimes associated together in companies, resorted to that island which was uninhabited, and made large draughts of seals from it. This mode of taking them was by an indiscriminate slaughter of males and females, and of course it was not long before the disastrous effects of that mode of taking them became apparent. They were greatly reduced in numbers, and at one or more times seemed to be upon the point, almost, of commercial extermination. By degrees they gradually learned what the laws of nature were in respect to the preservation of such a race of animals. They learned that they were highly polygamous in their nature, and that a certain draught could be taken from the superfluous males, without sensibly depreciating the normal numbers of the herd. Learning those facts, they by degrees established an industry upon that island, removed a considerable number of the population of one or more of the Aleutian Islands to that place, and kept them permanently there for the purpose of guarding the seals upon the island, and taking, at the times suitable for that purpose, such a number of superfluous males as the knowledge they had acquired taught them could be safely taken. The system which they established step by step grew more regular and precise, and sometime, I think I may say, in the neighborhood of 1840, they had adopted a regular system which absolutely forbade the slaughter of any females, and confined the taking to young males under certain ages, and limited the taking to a certain annual number. Under that reasonable system, conforming to

natural laws, the existence of that herd was perpetuated, and its numbers were even largely increased, so that at the time when it passed into the possession of the United States in 1867, I think I may say, it was true that the numbers of the herd were then equal to, if not greater than had ever been known since the island was first discovered. A similar system had been pursued by the Russians with similar effect, upon the Commander Islands — possessions of their own on the western side of the Behring Sea. These results, so useful to Russia, so beneficial to mankind, may be more easily appreciated, by comparing them with the results which had followed from the discovery of other homes of the fur-seals in other seas. It is well known that south of the Equator and near the southern extremity of the South American Continent, there were other islands, Massafuero, San Fernandez, and other places where there were seals almost in equal multitudes. They were on uninhabited islands; they were in places where no protection could be extended against the capture of them; they were on places where no system of regulation limiting the draughts which might be made upon them could be established, and the consequence was in a few short years they were practically exterminated from everyone of such points, and have remained ever since practically, and in a commercial point of view, exterminated, except in some few places over which the authority of some power has been exercised, and where Regulations have been established, more or less resembling those adopted on the Pribilof Islands, and by which means the race has to a certain extent, though comparatively small, been preserved.

That was the condition of things when these islands passed into the possession of the United States under the Treaty between that Government and Russia of 1867. At first upon the first acquisition by the United States Government its authority was not immediately established and consequently this herd of seals was laid open and exposed to the indiscriminate ravages of individuals tempted thither by their hope of gain and profit, and the consequence was that in the first year something like 240 000 seals were taken, and although some discrimination was attempted and an effort was made to confine the taking as far as possible to males only, yet those efforts were not in every respect successful. That great draught thus irregularly and indiscriminately made upon them had undoubtedly a disastrous effect, but the following year the United States succeeded in establishing its authority and it at once re-stablished the system which down to that time had been pursued by Russia, and which had been followed by such advantageous results. In addition to that and for the purpose of further insuring the preservation of the herd the United States Government resorted to national legislation. Acts were passed, the first of them as early as the year 1870, designed to protect the seal and other fur bearing animals in Behring Sea and other possessions recently acquired from Russia.

At a later period this statute, with others which were subsequently passed, were revised I think in the year 1873 when the general revision

of the statutes of the United States took place. They were revised and made more stringent. It was made a criminal offence to kill any female seals and the taking of any seals at all except in pursuance of the authority of the United States and under such Regulations as they might adopt was made a criminal offence. Any vessel engaged in taking of female seals in the waters of Alaska according to the phrase used in the statute was made liable to seizure and confiscation, and in this way it was held and expected that fur seals would be preserved in the future as completely as they had been in the past and that this herd would continue to be still as productive in the future and if possible made more productive. That system thus established by the United States in the year 1868, produced the same results as had followed the regulations established by Russia. The United States Government were enabled even to take a larger draught than Russia had prior to that time, made upon the herd. Russia had limited herself at an early period to the taking of somewhere between 30 000 and 40 000 seals only. Not solely perhaps for the reason that no more could be safely taken from the herd, but also for the reason, as I gather from the evidence, that at that time the demand for seals was not so great as to justify the putting of a larger number of skins upon the market. At a later period of the occupation by Russia her profits were increased, and at the time when the occupation was transferred to the United States I think they amounted to something between 50 000 and 70 000 annually. The United States as I say took 100 000 from the beginning and continued to make those annual draughts of 100 000 down to the end of the year 1889. That is a period of something like nineteen years.

The taking of this number of 100,000 did not at first appear to lead to any diminution whatever of the numbers of the herd and it was not until the year 1890 or a few years prior to that year, a diminution in the numbers of the herd was first observed and which was at that time attributed to causes of which I will presently say something. That was the industry established by the United States. It was a very beneficial industry, beneficial in the first instance to herself She had adopted the practice of leasing these islands upon long terms, 20 years, to a private corporation, and those leases contained an obligation to pay a large annual sum in the shape of a revenue or royalty a large annual gross sum of some 300,000 dollars or more. In addition to that the lessees were required to pay by the terms of the lease to the United States Government a certain sum on every seal captured by them which resulted, of course, in the enjoyment by the United States of a still larger revenue. It was beneficial to the lessees, for it is to be supposed — and such was the fact, that they were enabled to make a profit notwithstanding the large sums they were obliged to pay to the United States Goverment on the sale of the skins secured by them. But while it was profitable to the United States and profitable to the lessees, I may say — and this is what at all times I wish to impress upon this tribunal — it was still

more important and beneficial to the world at large. The fur seal is one of the bounties of Providence bestowed upon mankind — bestowed upon mankind in general, not for the benefit of this particular nation or that particular nation, but for the benefit of all alike, and all the benefit which mankind can get from that blessing is to secure the annual taking, the use and the enjoyment of the increase of the animal. That is all that they can obtain from it.

If they seek to obtain more, it is an abuse of the blessing involving destruction and necessary destruction, and they soon deprive themselves of the benefit altogether. This therefore was the benefit to mankind which was made possible to and enjoyed by mankind by this particular mode of dealing with the fur seals which had been established and carried on on the Pribiloff Islands. Mankind got the benefit of the entire annual increase and at the same time the stock was perpetually preserved and kept from any sort of peril. In that benefit citizens of the United States enjoyed no advantage over the rest of the world. The whole product of the trade was contributed at once to commerce and through the instrumentality of commerce was carried all over the world to those who desired the seal skins. Those who desired seal skins wherever they might be on the face of the globe and whatever nation they might belong to, got them upon the same terms that the citizens of the United States enjoyed them. This contribution to the annual product to the purposes of commerce to be dealt with as commerce deals with one of its subjects, of course amounted substantially to a putting up of the whole annual product, to auction, and it was awarded to the highest bidder wherever he might dwell. The effect of this was also, as we shall have occasion to see, in the course of this discussion, to build up and maintain an important industry in Great Britain. It was there that the seal skins were manufactured and prepared for sale in the market, and thousands of people were engaged in that industry many more, indeed, than were engaged in the industry of gathering the seals in the Pribilof Islands. That particular benefit was secured to Great Britain in reference to this industry.

Now, in the few years preceding 1890, the Government of the United States were made aware of a peril to the industry which had thus been established and which it was in the enjoyment of; a peril to the preservation of this race of seals; and it was a peril not proceeding from what may be called natural causes (such as the Killer-Whale, or other enemies which prey upon the seals in the water) but a peril proceeding from the hand of man. It was found that the pratice of pelagic sealing which had, for many years, and indeed from the earliest knowledge of these regions, been carried on to a very limited extent by the Indians who inhabited the coasts and for the purpose of obtaining food for themselves and skins for their clothing, — a very limited draught made upon the herds in that way — it was found that this practice was beginning to be extended so as to be carried on by the whites and in large vessels capable of procee-

ding long distances from the shore and of encountering the roughest weathers and of carrying boats and boatmen and hunters armed with every appliance for taking and slaughtering the seals upon their passage through the seas. That practice began, I think, in the year 1876; but, at first, its dimensions were small. Vessels were fitted out mostly from a port in British Columbia and confined their enterprise to the North Pacific Ocean, not entering Behring Sea at all; and their draughts upon the seals, even in the North Pacific Ocean, were at first extremely small, only a few thousands each year; but the business was found to be a profitable one, and, of course as its profit was perceived, more and more were tempted to engage in it and a larger investment of capital was made.

More and more vessels prosecuted the fishery in the North Pacific Ocean; and in 1883 for the first time, a vessel did venture to enter Behring Sea. The learned Arbitrators will perceive why up to this time during the whole of the Russian and the whole of the American occupation of these Islands there had been no such thing as pelagic sealing. Those two Nations had enjoyed the full benefit of this property, the full benefit of these herds of seals in as complete a degree as if they had been recognised as the sole proprietors of them and as if a title in them, not only while they were ashore and upon the breeding Islands, but while they were absent upon their migrations, — as if a title had been recognised in them during that whole period, or, if a title had not been recognised, there had been some Regulations among nations absolutely prohibiting all pelagic sealing. Up to the period when pelagic sealing began to be extended, as I have said, those advantages were practically enjoyed by Russia and the United States; and at first, as I have said, these enterprises did not extend into Behring Sea, but were carried on in the North Pacific Ocean and south and east of the Aleutian chain.

Then why was Behring Sea thus carefully abstained from? It may, perhaps, be difficult at the present time altogether to say. It may be for the reason that it was further off, or more difficult to reach. It may be for the reason that the pelagic sealers at first did not suppose that they had a right to enter Behring sea and take the seals there, for it was well known that, during the whole Russian occupation, Russia did assert for herself an exclusive right to all the products of that region of the globe, and it was also, of course, well known to all Governments and to these pelagic sealers that the United States had, when they acceded to the sovereignty over these regions, asserted a similar right and made the practice of pelagic sealing (in Behring sea at least perhaps further) a criminal offence under their Law. But, I say, whatever the cause, it was not until the year 1883 that any pelagic sealers ventured into Behring sea. During that year, a single vessel did enter there, took a large catch, was very successful, received no injury, was not called to any account; and this successful experiment was, of course, followed, during the suc-

ceeding years, by many repetitions of the same enterprise. The extent to which pelagic sealing was thus carried on in Behring sea, its probable consequences upon the herds which made their home upon the Pribilof Islands was not at first considered either by the United States or by the lessees of the Islands. There was no means by which they could easily find out how many vessels made such excursions, and they did not at first seem to suppose that their interests were particularly threatened by them; consequently, for the first two or three years, no notice seems to have been taken of these enterprises by the Government of the United States, although she had been always against them.

But when in 1886 this practice of taking seals at sea became so largely extended, it excited apprehensions for the safety of the herd; and it was perhaps thought at that time that there was already observable in the condition of the herd some of the damaging, destructive consequences of the pursuit of them by sea. The attention of the United States having been called to the practice, the Government determined to prevent it; and the mode of preventing it, the first method that the Government resorted to was an enforcement of the laws upon her statute-book, which prohibited the practice, and subjected all vessels engaged in it to seizure and confiscation. Instructions were accordingly given to the Cruisers of the United States to arrest the practice, and enforce those Laws; and the result was that, in the year 1886, three British vessels and some Americans were taken engaged in that pursuit, illegally under the Laws of the United States. They were carried in and condemned.

Those seizures were in 1886. They were followed by protest on the part of Great Britain and that protest was made by a note addressed by Sir Sackville West to Mr Bayard.

**Sir Charles Russell.** — Give us the references, Mr Carter, please, as you go along.

**Mr Carter.** — It is on page 153, vol. 1 of the appendix to the United States Case :

Washington, September 27, 1886. (Received September 28).

SIR : I have the honor to inform you that Her Majesty's Government have received a telegram from the commander-in-chief of Her Majesty's naval forces on the Pacific station respecting the alleged seizure of three Bristish Columbian seal schooners by the United States revenue cruiser *Corwin*, and I am in consequence instructed to request to be furnished with any particulars which the United States Government may posses relative to this occurrence.

I have, etc.,

That was the first note addressed by the British Government in consequence of these seizures and as the learned Arbitrators will perceive it called only for information. Mr Bayard, who was then the American Secretary of State, did not immediately respond to this note. He could not give the requisite information. The locality as you will perceive, is exceedingly remote from Washington and communication with it could

only be had on rare occasions. The opportunities for communication were very few, and therefore it was necessary, it was unavoidable that a very considerable period of time would elapse before the United States could procure the information desired by the British Government, and inform them of the particulars. But of course at that time the United States Government was called upon to consider questions that would thus be likely to arise and to determine the course it would be best for them to pursue in reference to those questions; and they were called upon at that time — they perhaps had been considering it before, but at least at that time — to consider the exigency with which they were thus confronted. What was it? Here had been an industry carried on for three fourths of a century by Russia before the acquisition by the United States. It had been continued by the United States for twenty years and continued with all the benefits to the United States and to the world which I have mentioned. It was threatened by this practice of pelagic sealing which was rapidly extending itself. What was pelagic sealing? for that was the thing which at first arrested the attention of the United States Government? What was pelagic sealing, and what were its obvious and its necessary consequences? I must say a single word or two upon that point, although it will subsequently form a subject of more extended discussion; but right upon its face, pelagic sealing appeared to be, as it undoubtedly was, simply a method of destroying the race of seals.

**Senator Morgan.** — Before you proceed to argue that, I would like to ask a question about the sealers in Bering Sea.

**Mr Carter.** — Certainly.

**Senator Morgan.** — I find a table in this appendix to the Case of the United States, which states that the "City of San Diego" a schooner, was seized by the United States Government on July 17th, and it was an United States ship.

**Mr Carter.** — Yes.

**Senator Morgan.** — And then the "Thornton", the "Carolina", and the "Onward" were seized subsequently on August first and second, and they were British. Is that the proper statement as you understand it?

**Mr Carter.** — Yes; I so understand it. The first seizures that were made were both American and British possessions.

**Senator Morgan.** — The first seizure that was made, according to this table — and that is the reason I call your attention to it — was an United States ship on July 17th, and then the next seizure was August 1st of British vessels.

**Mr Carter.** — Doubtless that is correct. I have not carried in my mind the fact, which is of course true, that the first seizure made was of an American vessel. It would appear to be so by the statement which was read by the learned Arbitrator.

I have said that pelagic sealing seemed to be simple destruction. It was destruction because it was not regulated. It was destruction because it proceeded in defiance of the obvious and well known laws which govern

the protection and preservation of the race of seals. If it continued it seemed to the United States that it would as surely result in the destruction of seals as the indiscriminate slaughter of them in the islands of the Southern ocean had resulted in the destruction of the herds in that quarter of the globe.

They could not imagine that that could be right. They could not imagine that it was right or proper for any nation or any men anywhere upon the globe, on the sea or on the land, to sweep out of existence one of the bounties of Providence. They could not imagine that, when there was an industry established and in full operation and which had been for nearly a century, by which the whole benefit of this race of animals was secured and permanently secured to man, without any peril to the stock, that any man or any nation could rightfully on the sea, or anywhere else, come in and by an indiscriminate and destructive pursuit of the animal take away that benefit for ever from mankind. So it seemed to them, and so therefore they had no hesitation in giving the instructions which resulted in the seizure of these vessels; and those seizures resulted in the demand which I have just read.

I have said that there was no immediate answer to this call of the British Government because owing to the remoteness of the situation the necessary information could not be procured. It was followed up, therefore very properly by Her Majesty's representative, and on the 21st of October, 1886 he addressed to Mr Bayard another note which will also be found on page 153 of the same volume, as follows :

Washington, October 21, 1886 (Received October, 22.)

Sir : With reference to my note of the 27th ultimo, requesting to be furnished with any particulars which the United States Government may possess relative to the seizure in the North Pacific waters of three British Columbian seal schooners by the United States revenue cruiser *Corwin*, and to which I am without reply, I have the honor to inform you that I am now instructed by the Earl of Iddesleigh, Her Majesty's principal secretary of state for foreign affairs, to protest in the name of Her Majesty's Government against such seizure, and to reserve all rights to compensation.

I have, etc.,

The state of mind in which the representatives of the British Government appear to be at this time is represented by a note from Earl of Iddesleigh to Sir Lionell Sackville West, which preceded the sending of the note which I have last mentioned. That was written on the 30th of October 1886. It proceeds with mentioning the fact that Her Majesty's Government was still awaiting the result of the application to the United States for information.

**Sir Charles Russell.** — It did not precede the other. It is later.

**Mr Carter.** — Yes, it is a later note. I am much obliged to you. It is a later note, dated October 30th :

*Earl of Iddesleigh to Sir L.S. Sackville West.*

Foreign Office, October 30, 1886.

Sir: Her Majesty's Government are still awaiting a report on the result of the application which you were directed by my dispatch No 181, of the 9th ultimo, to make to the Government of the United States for information in regard to the reported seizure by the United States revenue cutter *Corwin* of three Canadian schooners while engaged in the pursuit of seals in Behring's Sea.

In the meanwhile further details in regard to these seizures have been sent to this country, and Her Majesty's Government now consider it incumbent on them to bring to the notice of the United States Government the facts of the case as they have reached them from British sources.

**It seems the British Government had obtained some information which they had expected from the Government of the United States...**

It appears that the three schooners named respectively the "Carolina", and the "Onward", and the "Thornton" were fitted out in Victoria, British Columbia for the capture of seals in the waters of the Northern Pacific Ocean adjacent to Vancouver's island, Queen Charlotte islands and Alaska.

According to the depositions enclosed herewith from some of the officers and men these vessels were engaged in the capture of seals in the open sea, out of sigth of land when they were taken possession of on or about the 1st of August last by the United States Revenue cutter "Corwin" — the "Carolina" in latitude 55°50′ North, Longitude 168°53′ West; the "Onward" in latitude 50° and 52′ North and Longitude 167° and 55′ West, and the Thornton in about the same latitude and longitude.

They were all at a distance of more than sixty miles from the nearest land at the time of their seizure and on being captured were towed by the "Corwin" to Ounalaska, where they are still detained. The crews of the "Carolina" and "Thornton", with the exception of the Captain and one man of each vessel detained at that port, were it appears sent by the steamer St. Paul to San Francisco, Cal. and then turned adrift, white the crew of the "Onward" were kept at Ounalaska.

At the time of their seizure, the "Carolina" had six hundred and eighty six sealskins on board; the "Thornton", four hundred and four, and the "Onward", nine hundred; and these were detained, and would appear to be still kept at Ounalaska, along with the schooners by the United States authorities.

According to information given in the "Alaskan" a news-paper published at Sitka, in the territory of Alaska, and dated the 4th of September, 1886, it is reported:

1. That the master and mate of the schooner "Thornton" were brought for trial before judge Dawson in the United States, District Court at Sitka, on the 30th of August last.

2. That the evidence given by the officers of the United States revenue cutter "Corwin" went to show that the "Thornton" was seized while in Behring Sea, about 60 or 70 miles Southeast of St. George island, for the offence of hunting and killing seals within that part of Behring Sea, which (it was alleged by the Alaska newspaper) was ceded to the United States by Russia in 1867.

3. That the Judge in his charge to the jury, after quoting the first article of the Treaty of the 30th of March 1867 between Russia and the United States in which the Western boundary of Alaska is defined, went on to say:

**Then he gives an extract from the Judges charge.**

4. That the jury brought in a verdict of guilty against the prisoners, in accordance with which the Master of the "Thornton", Hans Guttonson, was sentenced

to imprisonment for thirty days and to pay a fine of $ 500; and the mate of the " Thornton ", Norman, was sentenced to imprisonment for thirty days, and to pay a fine of $ 300; which terms of imprisonment are presumably being now carried into effect.

There is also reason to believe that the masters and mates of the " Onward " and " Carolina " have since been tried and sentenced to undergo penalties similar to those now being inflicted on the master and mate of the « Thornton ".

**Sir Charles Russell.** —I would be glad, if it is not inconvenient to my friend, if he would read the grounds of the Judge's charge.

**Mr Carter.** — Certainly.

**Sir Charles Russell.** — Beginning with the words " All the waters ".

**Mr Carter.** — This is the part quoted from the Judge's charge :

All the waters within the boundary set forth in this Treaty to the Western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must, therefore, attach against any violation of law within the limits heretofore described. If therefore, the jury believe from the evidence, that the defendants by themselves or in conjunction with others, did, on or about the time charged in the information, kill any otter, mink, marten, sable or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behring Sea east of 193 degress of west longitude, the jury should find the defendants guilty and that the boundary in the Treaty is the western boundary named in the Treaty of cession to the United States from Russia.

The jury should find the defendants guilty and assess their punishment separately at a fine of not less than $ 200 nor more than $ 1,000, or imprisonment nor more than six months, or by both such fine (within the limits herein set forth) and imprisonment.

Lord Iddesleigh continues :

You will observe from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Behring Sea lying east of the westerly boundary of Alaska, as defined in the first article of the treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly? [westerly?] from the mainland of Alaska.

In support of this claim, those authorities are alleged to have interfered with the peaceful and lawful occupation of Canadian citizens on the high seas, to have taken possession of their ships, to have subjected their property to forfeiture, and to have visited upon their persons the indignity of imprisonment.

Such proceedings, if correctly reported, would appear to have been in violation of the admitted principles of international law.

I request that you will, on the receipt of this dispatch, seek an interwiew with Mr Bayard, and make him aquainted with the nature of the information with which Her Majesty's Government have been furnished respecting this matter, and state to him that they do not doubt that, if on inquiry it should prove to be correct, the Government of the United States will, with their well known sense of justice, at once admit the illegality of the proceedings resorted to against the British vessels and the British subjects above mentioned, and will cause reasonable reparation to be made for the wrongs to which they have been subjected and for the losses which they have sustained.

Should Mr Bayard desire it, you are authorized to leave with him a copy of this dispatch.

I am, etc.

IDDESLEIGH.

The learned Arbitrators will thus perceive the ground which the British Government were at first disposed to take, and a copy of this dispatch was eventually communicated no doubt, and therefore they did take this ground originally, and that this business of pelagic sealing was a peaceful and lawful occupation on the high seas, and that being such it could not be interferred with, nor could those who were engaged in it be taken and their property confiscated by the action of the United States Government. The ground was that this action of the United States Government is taken at a greater distance than three miles from the shore, outside of our jurisdiction and is therefore unauthorized on the part of the Government of the United States and unlawful. The grounds are two: first, that the occupation of pelagic sealing is a peaceful and lawful one; second, that outside upon the high seas the Government of the United States has no authority to arrest British vessels.

These requests from the representative of the Government of Great Britain upon Mr Bayard for information were from time to time repeated during the delay which occurred, and which was made necessary by the great remoteness of the scene of the difficulties from the city of Washington; and on the 4th of April, 1887, this note was addressed to Mr Bayard, on page 159 of the first volume of the Appendix to the United States Case:

Washington, April 4, 1887 (received april 4).

Sir: In view of the approaching fishing season in Behring Sea and the fitting out of vessels for fishing operations in those waters, Her Majesty's Government have requested me to inquire whether the owners of such vessels may rely on being unmolested by the cruisers of the United States when not near land.

Her Majesty's Government also desires to know whether documents referred to in your note of the 3d of February last connected with the seizure of certain British vessels beyond the three-mile limit and legal proceedings connected therewith have been received. And I have the honor therefore to request you to be good enough to enable me to reply to these inquiries on the part of Her Majesty's Government with as little delay as possible.

I have, etc.,

L. S. Sackville West.

In that note, as you will perceive, two points are made; first that some instructions should be given to United States cruisers so that British sealers should not be molested in the forthcoming season; and second, an inquiry whether the information desired had been received.

On the 12th of April, Mr Bayard replies to that note as follows:

Department of State, Washington, April 12, 1887.

Sir: I have the honor to acknowledge your note of the 4th instant relative to the fisheries in Behring Sea, and inquiring whether the documents referred to in my note of February 3, relating to the cases of seizure in those waters of vessels charged with violating the laws of he United States regulating the killing of fur seals, had been received.

The records of the judicial proceedings in the cases in the district court in Alaska referred to, were only received at this Department on Saturday last, and are now under examination.

The remoteness of the scene of the fur seal fisheries and the special peculiarities of that industry have unavoidably delayed the Treasury officials in framing appropriate regulations and issuing orders to United States vessels to police the Alaskan waters for the protection of the fur seals from indiscriminate slaughter and consequent speedy extermination.

The laws of the United States in this behalf are contained in the Revised Statutes relating to Alaska, in sections 1956-1971, and have been in force for upwards of seventeen years; and prior to the seizures of last summer but a single infraction is known to have occurred, and that was promptly punished.

The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur seals is now being considered, and I will inform you at the earliest day possible what has been decided, so that British and other vessels visiting the waters in question can govern themselves accordingly.

I have, etc.,

T. F. Bayard.

That was followed by a note from the British Minister to Mr Bayard, on July 8th :

Sir : With reference to your note of the 12th April, stating that the records of the judicial proceedings in the cases of the British vessels seized in the Behring Sea had been received, I have the honor to inform you that the Marquis of Salisbury has instructed me to request you to be good enough to furnish me with a copy of the same for the information of Her Majesty's Government.

Mr Bayard addresses a note on the 11th of July to Sir Lionell Sackville West as follows :

Sir : Complying with the request contained in your note of the 8th instant, conveyed to me under the instructions of your Government, I have the honor to enclose you two printed copies of the judicial proceedings in the United States district court for the District of Alaska in the several cases of libel against the schooners Onward, Carolina and Thornton, for killing fur seals in Alaskan waters.

The furnishing of these records to the representative of the British Government, containing a full report of the proceedings in the district court of Alaska of course conveyed to the British Government full information of the grounds upon which vessels of that nation had been seized and carried in and condemned. Upon those records having been received by the British Government they were transmitted to Lord Salisbury, and upon examination of them, and upon acquiring full knowledge, as he then did, of the ground upon which the vessels had been seized and condemned he addresses a note to the British Minister in Washington, of which a copy was to be furnished to the UnitedStates Government, and reconsiders those grounds and states the attitude of the British Government in relation to them. That letter was written on the 10th of September, 1887. Something like a year had elapsed, the learned Arbitrators will perceive from the time of the original seizures, which time had been occupied or not occupied in the endeavour to obtain this information The Marquis of salisbury writes :

*Marquis of Salisbury to Sir L. S. Sackville West.*

[Left at the Department of State by Sir L. S. Sackville West, September 23, 1887.]

Foreign Office, September 10, 1887.

SIR: By a dispatch of the 30th October last (No. 214) the late Earl of Iddesleigh instructed you to call the attention of the United States Secretary of State to the circumstances of the seizure in Behring's Sea, by the American cruiser *Corwin*, of some British Canadian vessels; and his lordship directed you to state to Mr Secretary Bayard that Her Majesty's Government felt sure that if the proceedings which were reported to have taken place in the United States district court were correctly described the United States Government would admit their illegality, and would cause reasonable reparation to be made to the British subjects for the wrongs to which they had been subjected and for the losses which they had sustained.

By a previous dispatch of the 9th September, you had been desired to ask to be furnished with any particulars which the United States Government might possess relative to the seizures in question; and on the 10th October you were instructed to enter a protest on behalf of Her Majesty's Government, and reserve for consideration hereafter all rights to compensation.

Nearly four months having elapsed without any definite information being furnished by the United States Government as to the grounds of the seizures, my predecessor instructed you, on the 8th of June [January?] last, to express to Mr Bayard the concern of Her Majesty's Government at the delay, and to urge the immediate attention of the United States Government to the action of the American authorities in their treatment of these vessels and of their masters and crews.

On the 3d February Mr Bayard informed you that the record of the judicial proceedings which he had called for was shortly expected to reach Washington, and that, without conclusion at that time of any questions which might be found to be involved in these cases of seizures, orders had been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

On the 4th of April, under instructions from me, you inquired of Mr Bayard, in view of the approaching fishing season in Behring's Sea, whether the owners of British vessels might rely when not near land on being unmolested by the cruisers of the United States, and you again asked when the record of the judicial proceedings might by expected.

Mr Bayard informed you, in reply (12th April), that the papers referred to had reached him and were being examined; that there had been unavoidable delay in framing appropriate regulations and issuing orders to the United States vessels to police the Alaskan waters; that the Revised Statutes relating to Alaska, sections 1956 and 1971, contained the laws of the United States in relation to the matter; and that the regulations were being considered, and he would inform you at the earliest day possible what had been decided, so that British and other vessels might govern themselves accordingly,

In view of the statements made by Mr Bayard in his note of the 3d February, to which I have referred above, Her Majesty's Government assumed that, pending a conclusion of the discussion between the two Governments on the general question involved, no further similar seizures of British vessels would be made by order of the United States Government. They learn, however, from the contents of Mr Bayard's note of the 13th ultimo, inclosed in your dispatch, No, 245, of the 15th ultimo, that such was not the meaning which he intended should be attached to his communication of the 3d February; and they deeply regret to find a proof of their misinterpretation of the intentions of the United States Government from an announcement recently received from the commander-in-chief of Her Majesty's naval forces in the Pacific, that several more British vessels engaged in seal hunting in

Behring's Sea have been seized when a long distance from land by an American revenue vessel.

Her Majesty's Government have carefully considered the transcript record of the judicial proceedings in the United States district court in the several cases of the schooners *Carolina*, *Onward*, and *Thornton*, which were communicated to you in July, and were transmitted to me in your dispatch, No. 196, of the 12th of that month, and they can not find in them any justification for the condemnation of those vessels.

The libels of information allege that they were seized for killing fur seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States; and the United States Naval Commander Abbey certainly affirmed that the vessels were seized within the waters of, Alaska, but according to his own evidence, they were seized 75, 115, and 70 miles respectively, south-southwest of St-George's Island.

It is not disputed, therefore, that the seizures in question were effected at a distance from land far in excess of the limit of maritime jurisdiction, which any nation can claim by international law, and it is hardly necessary to add that such limit can not be enlarged by any municipal law.

The claim thus set up appears to be founded on the exceptional title said to have been conveyed to the United States by Russia at the time of the cession of the Alaska Territory.

The pretention which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Behring Sea was, however, never admitted either by this country or the United States of America. On the contrary, it was strenuously resisted, as I shall presently show, and the American Government can hardly claim to have received from Russia rights which they declared to be inadmissible when asserted by the Russian Government. Nor does it appear from the text of the treaty of 1867 that Russia either intended or purposed to make any such grant, for by Article I of that instrument Russia agreed to cede to the United States all the territory and dominion then possessed by Russia " on the continent of America and in the adjacent islands " within certain geographical limits described, and no mention was made of any exclusive right over the waters of Behring Sea.

Moreover, whatever rights as regards their respective subjects and citizens may be reciprocally conferred on the Russian and American Governments by treaty stipulation, the subjects of Her Majesty can not be thereby affected, except by special arrangement with this country.

With regard to the exclusive claims advanced in times past by Russia, I transmit to you documents communicated to the United States Congress in 1822, which show the view taken by the American Government of these pretentions.

In 1821 the Emperor of Russia had issued an edict establishing " rules for the limits of navigation and order of communication along the coast of the eastern Siberia, the northwestern coast of America and the Aleutian, Kurile, and other islands ".

The first section of the edict said :

> The pursuit of commerce, whaling, and fishing, and of all other industry on all islands ports, and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51st degree of northern latitude ; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Straits to the south cape of the Island of Urup, viz, to the 45° 50' of northern latitude, is exclusively granted to Russian subjects.

And section 2 stated :

> It is, therefore, prohibited all foreign vessels, not only to land on the coast and islands belonging to Russia, as ted above, but also to approach them within less than 100 Italian miles. The transgres r's vessel is subject to confiscation, along with the whole cargo.

Lord Salisbury then proceeds : — I desire to save reading as far as possible — to state that copies of these regulations were communicated to the

American Secretary of State, at that time Mr John Quincy Adams, of great repute in his day, and great fame since, and that he asked the Russian Government for an explanation of the grounds upon which such provisions were based. The Russian Minister in his reply, dated the 28th of February, after explaining how Russia had acquired her possessions in North America, said :

I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the northward coast of America from Behring's Strait to the 51st degree of north latitude, and on the opposite side of Asia and the islands adjacent from the same strait to the 45th degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to shut seas (" *mers fermées* "), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners; but it preferred only asserting its essential rights without taking advantage of localities.

That is the explanation given by the Russian Minister. Lord Salisbury continues :

On the 30th March Mr Adams replied to the explanations given by the Russian minister. He stated that, with respect to the pretension advanced in regard to territory, it must be considered not only with reference to the question of territorial rights, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. That from the period of the existence of the United States as an independent nation their vessels had freely navigated these seas, the right to navigate them being a part of that independence; and with regard to the suggestion that " the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, " because it claims territory both on its American and Asiatic shores ", it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude or 4000 miles. " Mr Adams concluded as follows :

These words are quotations from Mr Adams.

The President is persuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights.

Lord Salisbury thus reiterated the position which had been taken, that the United States Government had no authority to enforce its municipal laws upon any part of these seas outside of the ordinary three mile limit; and in support of that position he referrred to the action of the American Government in 1822 protesting against the provisions on the part of Russia to exercise what the United States Government then seemed to think were acts of sovereignty over these very seas; and of course his argument was that the United States Government will hardly pretend now to exercise jurisdictional rights over those which, when asserted by Russia so many years ago, they protested against so vigorously. It will be observed that in this letter of Lord Salisbury, he makes no allusion to any supposed question of property. He makes no allusion to the industry carried on upon the Pribilof Islands, of guarding these seals, preserving them, for the uses of commerce. He makes no allusion to

the question whether that pelagic sealing is right or wrong in itself, but seems to consider that, whether right or wrong, and whether there is any property interest or not, the United States has no right to capture or confiscate a vessel upon the high seas because it is an attempt to enforce her municipal laws only. He puts himself upon the ground — not an unnatural one at all under the circumstances, having been shown the record of an American Tribunal of a libel upon a British vessel based upon an asserted violation of American law — that American municipal law which is the sole defence, as he supposed, of the taking of the vessels, cannot be enforced upon the high seas, and has no authority there; and he cites in favor of that position the prior action of the American Government.

Now at this time, information of the facts having reached both Governments, and the British Government having made a demand, and Lord Salisbury having put himself upon this ground, the question arose with the American Government what it was best to do. What was the situation? Here was its industry, its property, as it supposed, carried on for a century in the face of the whole world, and hitherto unmolested by the world — an industry beneficial to itself, and equally beneficial to the rest of mankind. That industry and the herd of seals upon which it rested was threatened with certain destruction, as it was viewed by the American Government, by this practice of pelagic sealing. Efforts had been made to arrest it by an enforcement in form — that was the form it took — of this American statute, which efforts had been exerted against both American and British vessels. They were made, so far as Great Britain was concerned on the ground that it was an exercise of authority which the United States did not have over the high seas; and a protest was made on that basis. What was the United States Government to do under those circumstances? There was this complete and perfect property in them. There was this destructive character of pelagic sealing, a manifest indisputable wrong, as it appeared to the Government of the United States, and if a wrong destructive of one of her own interests, therefore there must be an undoubted right somewhere and somehow to arrest the further progress of that wrong. The steps taken to do it had excited this protest upon the part of Great Britain, and undoubtedly did involve the exercise of an exceptional authority on the high seas.

The exigency might have been met in various ways. Mr Bayard might have asserted the authority of the United States to repress this practice at once, and continued to assert that authority and taken all the consequences. It is easy to see what they might have led to. A position once taken by the United States upon that question could not have been receded from. A position taken, upon the other side, by Great Britain could not perhaps have been receded from; and the result of that, as the cause of the controversy and the sources of irritation were present at hand at all times would have been that they would be continually repeated, and would inevitably have led to hostilities. Another course was to

endeavour to settle the controversy without a resort to any discussion of the respective rights of the Governments which were immediately concerned, and to settle it upon the assumption that whatever the rights were, upon the one side or the other, the effect of this practice of pelagic sealing to which the United States objected was so manifestly injurious, and the practice so manifestly wrong, that all Governments would probably assent to its repression, and thus the difficulty would be avoided.

Mr Bayard did not believe, could not believe, that the practice of pelagic sealing was a right one. He did not believe, he could not believe that any civilized nation would think it to be right. That was his view; but the course which statesmen take is in most instances perhaps a good deal governed by their particular personal character. Mr Bayard, I need not say, was a statesman of the most enlightened character and the most humane views. No man had a more perfect abhorrence for war than he. No man had a lower estimate of force as a mode of adjusting international conflicts, and in respect to a question which as he viewed it, there ought to be no difference among enlightened men, there would be no excuse on the part of the Government of the United States in so dealing with it as to make a resort to hostilities even probable. His course therefore at first was a conciliatory one. He determined to address the Government not only of Great Britain but the several Governments of the great maritime nations, to put the question before them, and to invite them to consider this question and come to an agreement in reference to this business of pelagic sealing such an agreement as would prevent the extermination of the race without any resort to irritating discussions upon questions of right. That position of Mr Bayard is represented by the first note of a deliberate character respecting this matter which he wrote. It is found on page 168 of the Volume to which I have been referring. The copy here is a note from him to Mr Vignaud; but copies of it were sent to the United States Ministers in Germany, Great Britain, Russia, Sweden and Norway and Japan.

**Sir Charles Russell.** — I do not think a copy of this was sent to Great Britain.

**Mr Carter.** — I think it was.

**Sir Charles Russell.** — I think not.

**Mr Carter.** — That is my impression.

**Mr Foster.** — Yes.

**Mr Carter.** — I will read this note :

*Mr Bayard to Mr Vignaud.*

Department of State Washington, August 19, 1887.

Sir : Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring sea.

Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and

without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable — and I am instructed by the President so to inform you — to attain the desired ends by international cooperation,

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and, by breaking up their habitual resorts, has greatly reduced their number.

Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seal in Behring sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind.

The ministers of the United States to Germany, Sweden and Norway, Russia, Japan, and Great Britain have been each similarly addressed on the subject referred to in this instruction.

I am, etc.,

T. F. Bayard.

That was the attitude first taken by Mr Bayard towards other nations. He refers in the first place to the peculiar character of the property in question; and of course in referring to the peculiar character of the property in question he means that it is an animal that passes part of its life on the land part in the sea. He refers to the exceptional marine jurisdiction which the United States might claim to exercise for the purpose of protecting a piece of property so peculiar in its character. He expresses a desire to avoid discussion of those subjects and he makes his appeal generally to those who are in charge of the interests of mankind to come to some international agreement by which an animal so important in its benefits as the seal is may be effectually preserved. That was the attitude taken by Mr Bayard, characteristic of the man, conciliatory in his methods and as it seem to me the one which an enlightened statesman should have taken under the circumstances.

The nations other than Great Britain who were thus addressed answered this note, I believe I am correct in saying, in rather a formal way that they were not specially interested in the subject-matter of the controversy but would take the suggestions into, serious consideration and await such discussion of them as might be had; so far as Great Britain is concerned, I think I may say that the suggestions thus made by Mr Bayard communicated to Lord Salisbury by the United States representative in England at that time, my associate M. Phelps, were received at once spirit in which they were offered.

**Senator Morgan.** — Mr Carter, if you will allow me I think that the diplomatic correspondance shows that Japan and Russia coincided with the proposition of the United States and Norway and Sweden expressed their concurrence in the ideas presented in the note of Mr Bayard, but said that that Government was not at present interested in the question and suggested that the convention should be so framed as to admit other

accepted by him in the powers to join subsequenty, if they saw proper.

**Mr Carter.** — I should have observed that Japan and Russia made a favorable response to these suggestions but other nations not particularly interested answered I think in the way I suggested.

But what I had particularly in mind to impress upon the Tribunal was what I think will prove to be true, namely that when these conciliatory suggestions were made to Lord Salisbury they were accepted by him in the spirit in which they were tendered. The first note which I shall read upon that point is that of Mr Phelps to Mr Bayard which was dated in London, 12th November 1887, the letter of Mr Bayard having been dated 19th of August. Mr Phelps says :

*Mr Phelps to Mr Bayard*

Legation of the United States,

London, November 12, 1887. (Received November 22.)

SIR : Referring to your instructions numbered 685, of August 19, 1887, I have now to say that owing to the absence from London of Lord Salisbury, secretary of state for foreign affairs, it has not been in my power to obtain his attention to the subject until yesterday.

I had then an interview with him, in which I proposed on the part of the Government of the United States that by mutual agreement of the two Governments a code of regulations should be adopted for the preservation of the seals in Behring Sea from destruction at improper times and by improper means by the citizens of either country ; such agreement to be entirely irrespective of any questions of conflicting jurisdiction in those waters.

His lordship promptly acquiesced in this proposal on the part of Great Britain and suggested that I should obtain from my Government and submit to him a sketch of regulations which would be adequate for the purpose.

I have therefore to request that I may be furnished as early as possible with a draft of such a code as in your judgment should be adopted.

I would suggest also that copies of it be furnished at the same time to the ministers of the United States in Germany, Sweden and Norway, Russia, France, and Japan, in order that it may be under consideration by the Governments of those countries. A mutual agreement between all the government interested may thus be reached at an early day.

I have, etc.,

E. J PHELPS.

I assume from this that Mr Phelps communicated the instructions which he had received from Mr Bayard and that in that way the note of Mr Bayard was communicated to the Government of Great Britain.

**Sir Charles Russell.** — That is substantially correct.

**Mr Carter.** — And the learned arbitrators will perceive from this that in carrying out the instructions which he had received from Mr Bayard. Mr Phelps proposed to Lord Salisbury the establishment of a code of Regulations for the restriction of pelagic sealing by citizens of either country during certain times. The idea was a code of Regulations establishing what was called a " close time " ; and to that suggestion, which was designed to carry out Mr Bayard's object of preserving the seals by international agreement a prompt assent was given by Lord Salisbury.

What was awaited, therefore, was the framing by the United States of a code of Regulations sufficient to carry out the object in view. Mr Phelps upon receiving that communication presumably at least, — perhaps his letter may be somewhere printed but I do not know that it is — informed Mr Bayard of this fact and Mr Bayard adresses this communication to him which is found on page 175.

**The President.** — Mr Carter, I would suggest that before we begin this new question we might rest a while.

The Tribunal thereupon took a recess for a short time.

**The President.** — Mr Carter, will you proceed?

**Mr Carter.** — Mr President, when the Tribunal rose for its recess, I was calling the attention of the learned Arbitrators to the course of the correspondence which arose in reference to the seizures of British vessels. I had stated the conciliatory action which Mr Bayard, the United States Secretary of State had chosen to take in reference to the sending communications by him to the American Ministers to the various maritime nations, and to the response which had been received to the communication thus made from Lord Salisbury, the British Minister of Foreign Affairs. I had read as showing that response the note of Mr Phelps to Mr Bayard of November 12, 1887. That note which is short, for the purpose of making sure that the learned Arbitrators have in mind the course of explanation which I have designed to pursue, I beg leave to read again :

*Mr Phelps to Mr Bayard*

Legation of the United States,

London, November 12, 1887. (Received November 22.).

Sir : Referring to your instructions numbered 685, of August 19, 1887, I have now to say that owing to the absence from London of Lord Salisbury, secretary of state for foreign affairs, it has not been in my power to obtain his attention to the subject until yesterday.

I had then an interview with him, in which I proposed on the part of the Government of the United States that by mutual agreement of the two Governments a code of regulations should be adopted for the preservation of the seals in Behring Sea from destruction at improper times and by improper means by the citizens of either country; such agreement to be entirely irrespective of any questions of conflicting jurisdiction in those waters.

His lordship promptly acquiesced in this proposal on the part of Great Britain and suggested that I should obtain from my Government and submit to him a sketch of a system of regulations which would be adequate for th purpose.

I have therefore to request that I may be furnished as early as possible with a draft of such a code as in your judgment should be adopted.

I would suggest also that copies of it be furnished at the same time to the ministers of the United States in Germany, Sweden and Norway, Russia, France, and Japan, in order that it may be under consideration by the Governments of those countries. A mutual agreement between all the Governments interested may thus be reached at an early day.

I have, etc.,

E. J. Phelps.

Mr Bayard having received that communication, was evidently gratified at the prospect of an amicable solution of the difficulty, and he addresses this note to Mr Phelps on the 25th of November, 1887 :

N° 733 *Mr Bayard to Mr Phelps.*

Department of State, Washington, November 25, 1887.

SIR : Your No 618, of the 12th instant, stating the result of your interviews with Lord Salisbury on the subject of the seal fisheries in Behring Sea, is received.

The favorable response to our suggestion of mutually agreeing to a code of Regulations is very satisfactory, and the subject will have immediate attention.

I am, etc.,

T. F. BAYARD.

You will remember that Mr. Phelps requested of him a proposed Code of Regulations. On the 7th of February, 1888, Mr Bayard again addresses Mr Phelps, and in his communication (U. S. C. App., vol. I, p. 172.) gives the material elements of a proposed Code, and that it is somewhat important to consider.

*Mr Bayard to Mr Phelps.*

Department of State, Washington, February 7, 1888.

SIR : I have received your No 618, of the 12th of November last containing an account of your interview with Lord Salisbury of the preceding day, in which his lordship expressed acquiescence in my proposal of an agreement between the United States and Great Britain in regard to the adoption of concurrent regulations for the preservation of fur seals in Behring Sea from extermination by destruction at improper seasons and by improper methods by the citizens of either country.

In response to his lordship's suggestion that this Government submit a sketch of a system of regulations for the purpose indicated, it may be expedient, before making a definite proposition, to describe some of the conditions of seal life; and for this purpose it is believed that a concise statement as to that part of the life of the seal which is spent in Behring Sea will be sufficient.

All those who have made a study of the seals in Behring Sea are agreed that, on an average, from five to six months, that is to say, from the middle or toward the end of spring till the middle or end of October, are spent by them in those waters in breeding and in rearing their young. During this time they have their rookeries on the islands of St. Paul and St. George, which constitute the Pribilof group and belong to the United States, and on the Commander Islands, which belong to Russia. But the number of animals resorting to the latter group is small in comparison with that resorting to the former. The rest of the year they are supposed to spend in the open sea south of the Aleutian Islands.

Their migration northward, which has been stated as taking place during the spring and till the middle of June, is made through the numerous passes in the long chain of the Aleutian Islands, above which the courses of their travel converge chiefly to the Pribilof group. During this migration the female seals are so advanced in pregnancy that they generally give birth to their young, which are commonly called pups, within two weeks after reaching the rookeries. Between the time of the birth of the pups and of the emigration of the seals from the islands in the autumn the females are occupied in suckling their young; and by far the largest part of the seals found at a distance from the islands in Behring Sea during the summer and early autumn are females in search of food, which is made doubly necessary to enable them to suckle their young as well as to support a condition of renewed pregnancy, which begins in a week or a little more after their delivery.

The male seals, or bulls, as they are commonly called, require little food while on the islands, where they remain guarding their harems, watching the rookeries, and sustaining existence on the large amount of blubber which they have secreted beneath their skins and which is gradually absorbed during the five or six succeeding months.

Moreover, it is impossible to distinguish the male from the female seals in the water, or pregnant females from those that are not so. When the animals are killed in the water with firearms many sink at once and are never recovered, and some authorities state that not more than one out of three of those so slaughtered is ever secured. This may, however, be an overestimate of the number lost.

It is thus apparent that to permit the destruction of the seals by the use of firearms, nets, or other mischievous means in Bering Sea would result in the speedy extermination of the race. There appears to be no difference of opinion on this subject among experts. And the fact is so clearly and forcibly stated in the report of the inspector of fisheries for British Columbia of the 31st of December, 1886, that I will quote there from the following pertinent passage :

There were killed this year, so far, from 40,000 to 50,000 fur seals, which have been taken by schooners from San Francisco and Victoria. The greater number were killed in Behring Sea, and were nearly all cows or female seals. This enormous catch, with the increase which will take place when the vessels fitting up every year are ready, will, I am afraid, soon deplete our fur-seal fishery, and it is a great pity that such a valuable industry could not in some way be protected. (Report of Thomas Mowat, inspector of fisheries for British Columbia; Sessional Papers, Vol. 15, No. 16, p. 268; Ottawa, 1887.)

The only way of obviating the lamentable result above predicted appears to be by the United States, Great Britain, and other interested powers taking concerted action to prevent their citizens or subjects from killing fur seals with firearms, or other destructive weapons, north of 50° of north latitude, and between 160° of longitude west and 170° of longitude east from Greenwich, during the period intervening between April 15 and November 1.

The limits thus described by M. Bayard, and which I believe are first described, are these: between 160° of longitude west and 170° of longitude east from Greenwich. [*Describing on the plan.*] *This*, you will see, is 170° of longitude east, and *this* is 160° of longitude west. *There* is the 50° of latitude, and it is from *this* point, 170° east to 160° west, — all north of *that* was the proposition, — all north of the parallel of 50° of latitude, and between 160° *there* and 170° *there*. [*Indicating it.*] This included the whole of Behring Sea substantially and a considerable part of the North Pacific Ocean south of Behring Sea.

**Sir Charles Russell.** — That would exclude, I think, the Commander Islands.

**Mr Carter.** — Apparently it would exclude the Commander Islands.

To prevent the killing within a marine belt of 40 or 50 miles from the islands during that period would be ineffectual as a preservative measure. This would clearly be so during the approach of the seals to the islands. And after their arrival there, such a limit of protection would also be insufficient since the rapid progress of the seals through the water enables them to go great distances from the islands in so short a time that it has been calculated that an ordinary seal could go to the Aleutian Islands and back, in all a distance of 360 or 400 miles, in less than two days. On the Pribilof islands themselves, where the killing is at present under the direction of the Alaska Commercial Company which, by the terms of its contract, is not permitted to take over 100,000 skins a year, no females, pups, or old bulls are ever killed, and thus the breeding of the animals not interfered with. The old bulls are the first to reach the islands, where await they the coming of the

females. As the young bulls arrive, they are driven away by the old bulls to the sandy part of the Islands by themselves. And these are the animals that are driven in land and there killed by clubbing, so that the skins are not perforated and discrimination is exercised in each case. That the extermination of the fur-seals must soon take place unless they are protected from destruction in Behring Sea is shewn by the fate of the animal in other parts of the world in the absence of concerted action among the nations interested for its preservation.

Formerly, many thousands of seals were obtained annually from the South Pacific islands and from the coasts of Chili and South Africa. They were also common in the Falkland islands and the adjacent seas. But in those islands, where hundreds of thousands of skins were formerly obtained, there have been taken, according the best statistics, since 1880 less than 1,500 skins.

In some places, the indiscriminate slaughter, especially by use of firearms, has, in a few years, resulted in completely breaking up extensive rookeries.

At the present time it is estimated that out of an aggregate yearly yield of 185,000 seals from all parts of the Globe, over 130,000, or more than two-thirds are obtained from the rookeries on the American and Russian islands in Behring Sea. Of the remainder, the larger part are taken in Behring Sea, although such taking, at least on such a scale, in that quarter is a comparatively recent thing. But if the killing of the fur-seal there with fire-arms, nets, and other destructive implements were permitted, the hunters would abandon other and exhausted places of pursuit for the more productive field of Behring Sea, where extermination of this valuable animal would also rapidly ensue. It is manifestly for the interest of all nations that so deplorable a thing should not be allowed to occur. As has already been stated, on the Pribilof islands this Government strictly limits the number of seals that may be killed under its own lease to an American Company, and citizens of the United States have during the past year been arrested, and ten American vessels seized, for killing fur-seals in Behring Sea. England however, has an especially great interest in this matter, in addition to that which she must feel in preventing the extermination of an animal which contributes so much to the gain and comfort of her people. Nearly all undressed fur-seal skins are sent to London where they are dressed and dyed for the market, and where many of them are sold. It is stated that at least ten thousand people in that city find profitable employment in this work; far more than the total number of people engaged in hunting the fur-seal in every part of the world.

At the Pribilof islands it is believed that there are not more than 400 persons so engaged; at Commander Islands, not more 300; in the North West coast fishery not more than 525 indian hunters and 100 whites; and in the cape Horn fishery, not more than 400 persons, of whom perhaps 300 are Chileans. Great Britain, therefore, in co-operating with the United States to prevent the destruction of fur seals in Behring Sea would also be perpetuating an extensive and valuable industry in which her own citizens have the most lucrative share. I inclose for your information copy of a memorandum on the fur seal fisheries of the World, prepared by Mr A. Howard Clark, in response to a request made by this Department to the United States Fishery Commissionner. I enclose also for your further information, copy of a letter to me dated December 3rd last from Mr Henry W. Elliot, who has spent much time in Alaska, engaged in the study of seal life upon which he is well known as an authority. I desire to call your special attention to what is said by Mr Elliott in respect to the new method of catching the seals with nets. As the subject of this dispatch is one of great importance and of immediate urgency I will ask that you give it as early attention as possible.

**That was Mr Bayard's No 782, Mr Phelps ack nowledges that on the 18th February 1888 thus :**

Sir : I received your instruction No 782 under date of February 7th relative to the Alaskan Seal Fisheries. I immediately addressed a note to Lord Salisbury, inclosin for his perusal one of the printed copies of the instruction and requesting

appointment for an early interview on the subject. I also sent a note to the Russian Ambassador, and an interview with him is arranged for the 21st instant. The whole matter will receive my immediate and thorough attention, and I hope for a favourable result. Meanwhile, I would ask your consideration of the manner in which you would propose to carry out the Regulations of these Fisheries that may be agreed upon by the countries interrested. Would not legislation be necesary? and if so, is there any hope of obtain ing it on the part of Congress?

I have, etc. "E.-J. PHELPS."

Subsequently on the 25th February he again addressed Mr Bayard and this is his note :

SIR : referring to your instructions No 782 of February 7th 1888 in reference to the Alaska Seal Fisheries February 18th, I have the honor to inform you that I have since had interviews on the subject with Lord Salisbury and with M. de Staal, the Russian Ambassador.

Lord Salisbury assents to your proposition to establish by mutual arrangement between the Governments interested a close time for seals between April 15 and November 1st between 160° of longitude west and 170° longitude east in the Behring Sea. He will also join the United States Government in any preventive measures it may be for the best to adopt by orders issued to the naval vessels of the respective governments.

I have this morning telegraphed you for additional printed copies of instructions 782 for the use of Her Majesty's Government.

The Russian Ambassador concurs, so far as his personal opinion is concerned, in the propriety of the proposed measures for the protection, of seals and has also promised to communicate at once with his government in regard to it. I have furnished him with copies of instruction 782 for the use of his government.

The learned Arbitrators will thus perceive from Mr Phelps' note that the proposed clause, extending between 170° East longitude and 160° West longitude, and beginning at the 50° parallel of latitude and including everything north, was at once assented to; and that pelagic sealing within that area was to be prohibited between April the 15th and November the 1st. Of course, I do not understand from this note that Mr Phelps intimated that the Agreement was absolutely final so that it might be put in the form of a Treaty or Convention, — not that, — but only that the proposition of Mr Bayard containing that measure of restriction was at once assented to by Lord Salisbury without objection, although, of course, further cõmmunication might be had before the measure was put in the shape of a Treaty; nor do I mean to intimate that Mr Phelps states that the Agreement was an absolute one and precluded any withdrawal from it. Mr Bayard again addresses Mr Phelps on the 2nd of March, 1888; in which he acknowledges the receipt, not of the last letter that I read, but the one prior to that of February the 18th, 1888.

SIR : I have to acknowledge the receipt of your No 690 of the 18th ultimo in relation to the Alaskan seal fisheries, and have pleasure in observing the promptitude with which the business has been conducted. It is hoped that Lord Salisbury will give it favorable consideration as there can be no doubt of the importance of preserving the seal fisheries in Behring Sea, and it is also desirable that this should be done by an arrangement between the Governments interested, without the United States being called upon to consider what special measures of its own the exceptional character of the property in question might require it to take in case of

the refusal of foreign powers to give their co-operation. Whether legislation would be necessary to enable the United States, and Great Britain, to carry out measures for the protection of the seals would depend much upon the character of the Regulations; but it is probable that legislation would be required. The manner of protecting the seals would depend upon the kind of arrangement which Great Britain would be willing to make with the United States for the policing of the seas and for the trial of British subjects violating the Regulations which the two Governments may agree upon for such protection; as appears to this Government the commerce carried on in or about Behring Sea is so limited in variety and extent that the present efforts of this Government to protect the seals need not be complicated by considerations which are of great importance in highways of commerce and render the interference by the officers of one Government with the merchant vessels of another on the high sea inadmissible; but even in regard to those parts of the Globe where commerce is extensively carried on, the United States and Great Britain have for a common purpose abated in a measure their objection to such interference, and agreed that it might be made by the naval vessels of either country. Reference is made to the Treaty concluded at Washington on the 7th of April, 1862, between the United States and Great Britain for the suppression of the slave trade, under which the joint policing of the seas by the naval vessels of the contracting parties was provided for. In this Convention no limitation was imposed as to the part of the high seas of the world in which visitation and search of the merchant vessels of one of the contracting parties might be made by a naval vessel of the other party. In the present case, however, the range within which visitation and search would be required is so limited, and the commerce there carried on so insignificant, that it is scarcely thought necessary to refer to the slave trade Convention for a precedent, nor is it deemed necessary that the performance of police duty should be by the naval vessels of the contracting parties. In regard to the trial of offenders for violation of the proposed Regulations, provision might be made for such trial by handing over the alleged offender to the Courts of his own country. A precedent for such procedure is found in the Treaty signed at the Hague on May 5th 1882, for sed.

The learned Arbitrators will see that, so far, the diplomatic communications have resulted in this; that, upon the first proposal of concurrent Regulations by Great Britain, it was acceded to by Lord Salisbury; and a draft of the proposed Regulations were requested by Mr Phelps from Mr Bayard in order that he might more distinctly state the terms of it to Lord Salisbury. Having obtained the draft of the proposed Regulations, which provided for a close season over an area which I have already described, that was submitted to Lord Salisbury, and met with his prompt assent; and that, it will be perceived, made a close period between April the 15th and November, the 1st. Then I think it was shortly after this (if I am correct in my recollection), on or about the 5th of April, 1888, that Mr Phelps left London, and went to the United States for a while; and the affairs of the mission in London were left in charge of Mr White, and there are some letters from Mr White to Mr Bayard which show the further progress of the business. Mr White, on the 7th of April, addressed Mr Bayard, and the informed him that on the following Thursday he was to meet Lord Salisbury and mons de Staal to discuss the question of the protection of the seals.

On April the 7th, Mr White had an interview on the subject with Mons. de Staal from whom he learned that the Russian Government wished to include in the proposed arrangement that part of Behring Sea

in which the Commander islands are situated and also the Sea of Okhotsk. Mr White supposed that the United States would not object to this. On the same day, he addresses this letter to Mr Bayard :

London. *April* 7th, 1888.

Sir : Referring to your instructions numbered 782 of February the 7th and 810 of March the 2nd. respecting the protection of seals in Behring Sea, I have the honour to acquaint you that I received a private note from the Marquis of Salisbury this morning stating that at the request of the Russian Ambassador he had appointed a meeting at the Foreign Office next Wednesday the 11th instant, to discuss the question of a close time for the seal fishery in Behring Sea and expressed a hope that I would, make it convenient to be present ; and I have replied that I shall be happy to attend. Subsequently, I saw Mons. de Staal, the Russian Ambassador, at his request. He referred to the interviews which Mr Phelps had had with him, of which I was, of course, cognisant, and stated that his full instructions on the subject would not reach London until tonight or tomorrow, and that he was about to leave town until next Wednesday, but meanwhile he could say that his Government would like to have the Regulations which might be agreed upon for Behring Sea extended to that portion of the latter in which the Commander islands are situated and also to the sea of Okhotsh in which Robben island is situated. As both these places are outside the limit laid down in your instructions numbered 782 (170° of longitude east from Greenwich) I have thought it best to send you the telegram, of which I enclose a copy herewith.

Then on the 20th of April, Mr White again writes to Mr Bayard.

Sir : Referring to your instructions, Nos 685, — and to subsequent correspondence I have the honour to acquaint you that I called at the Foreign Office on the 16th instant for the purpose of discussing with the Marquis of Salisbury and Mons. de Staal, the Russian Ambassador, the details of the proposed Conventional arrangement for the protection of seals in Behring Sea.

Mons. de Staal expressed a desire, on behalf of his Government, to include, in the area to be protected by the Convention, the sea of Okhotsk, or, at least, that portion of it in which Robben Island is situated, there being, he said, in that region large numbers of seals whose destruction is thereatened in the same way as those in Behring Sea. He also urged that measures be taken by the insertion of a clause in the proposed Convention, or otherwise, for prohibiting the importatien by merchant vessels into the seal protected area for sale therein of alcoholic drinks, firearms, gunpowder, and dynamite. Lord Salisbury expressed no opinion with regard to the latter proposal ; but with a view to meeting the Russian Governments' wishes respecting the waters surrounding Robben Island, he suggested that besides the whole of Behring Sea those portions of the sea of Okhotsk and of the Pacific Ocean north of North latitude 47° should be included in the proposed arrangement.

This suggestion of Lord Salisbury's carried down further south the protected area from 50° parallel of latitude, say, as far as the point upon which my pointer rests, [Pointing] and to include the whole of that part of the Pacific Ocean, so as to include not only the Commander Islands, but also Robben Island in the sea of Okhotsk.

His Lordship intimated further more that the period proposed by the United States for a close time April 15th to November 1st, might interfere with the trade longer than was absolutely necessary for the protection of seals, and he suggested October the 1st instead of a month later as the termination of seal protection. I referred to the communications alread made by Mr Phelps on this subject to Lord Salisbury and said that I should be obliged to refer to you the proposals which had just been made before expressing an opinion with regard to the same. Meanwhile the

Marquis of Salisbury proposed to have prepared a draft convention or submission to the Russian Ambassador and to myself. I shall lose no time in forwarding to you a copy of this document when received.

The learned Arbitrators will perceive that at this point the communicating diplomats, were to far agreed upon the subject that the matter was conceived by Lord Salisbury to be in a condition for the preparation of a draft convention. Accordingly, on the 1st May Mr Bayard addresses Mr White, and it is in answer to the last note of Mr White which I have just read. — " Washington, May 1st, 1888.

Washington, May 1st, 1888.

SIR : Your despatch, No 725 of the 20th ult stating the result of your interview with Lord Salisbury and the Russian Ambassador relative to the protection of seals in Behring Sea and requesting further instructions as to their proposals have been received. As you have already been instructed, the Department does not object to the inclusion of the sea of Okhotsk or so much of it as may be necessary in the arrangement for the protection of the seals, nor is it thought absolutely necessary to insist on the extension of the close season till the 1st November.

Only such a period is desired as may be requisite for the end in view. But in order that success may be assured in the efforts of the various Governments interested in the protection of the seals, it seems advisable to take the 15th October instead of the 1st as the date of the close season, although, as I am now advised, the 1st November would be safer.

Lord Salisbury had suggested the substitution of the 1st of October in the place of the 1st of November. Mr Bayard now suggests that it should be made the 15th of October, splitting the difference; although, as he says, he is advised the 1st of November would be safer.

The suggestion made by lord Salisbury, that it may be necessary to bring other Governments than the United States, Great Britain and Russia into the arrangement, has already been made by the action of the department, as I have heretofore informed you, at the same time the invitation was sent to the British Government to negotiate a convention for seal protection in Behring Sea a like invitation was extended to various other powers which have, without exception, returned a favorable response. In order, therefore, that the plan may be carried out the Convention proposed between the United States, Great Britain and Russian, should contain a clause providing for the subsequent adhesion of other powers. In regard to the suggestion of the Russian Ambassador, that the Convention be made to cover the question of the sale of fire-arms and liquor to the natives on the coast in question. I am compelled to think, while in favor of restricting or prohibiting such sale, that it would be advisable to regulate the subject separately from the protection of the seals. It is possible that some Governments might readily assent to the latter object, while indisposed to accede to the former, and in that way lead to the defeat of the end first proposed by this Government.

Then Mr White, in his next note to Mr Bayard, suggests a further stage which the matter had then reached. On the 20th of June, 1888, he thus writes :

SIR : I have the honor to inform you that I availed myself of an early opportunity to acquaint the Marquis of Salisbury and the Russian Ambassador of the receipt of your instructions numbered 864, of May 3rd; and shortly afterwards (May 16th) His Excellency and I called together at the Foreing Office for the purpose of discussing with his Lordship the terms of the proposed Convention for the protection

of seals in Behring Sea. Unfortunately, Lord Salisbury had just received a communication from the Canadian Government, stating that memorandum on the subject would shortly be forwarded to London, and expressing a hope that, pending the arrival of that document, no further steps would be taken in the matter by Her Majesty's Government. Under these circumstances, Lord Salisbury felt bound to await the Canadian memorandum before proceeding to draft the Convention.

I have enquired several times whether this communication from Canada had been received, but it has not yet come to hand. I was informed to day by Lord Salisbury that an urgent telegram had been sent to Canada, a week ago, with respect to the delay in its expedition, and that a reply had been received by the Secretary of State for the Colonies stating that the matter would be taken up immediately. I hope, therefore, that shortly after Mr Phelps, return this Government will be in a condition to agree upon the terms of the proposed convention. I have the honor to inclose for your information the copy of a question asked by Mr Gourley and answered by Sir James Fergusson in behalf of the British Government, with respect to the seal-fishing in the Behring Sea.

I have, etc.

The Arbitrators with perceive that at this point an obstacle was for the first time interposed in the progress of these negotiations, which would in all probability have resulted in a final agreement between the two countries for the preservation of the seals, by establishing a close season during the area mentioned, from the 1st of April to the 15th of October. Whether that protection would have been adequate is another question which I do not intend now to discuss but that the Convention would have been concluded substantially securing those terms it seems to me there can be no reasonable doubt. The obstacles to that arose from the protest on the part of Canada. Lord Salisbury had undoubtedly very properly as the Canadian people were more interested in the preservation of pelagic sealing than others, sent some communication to the Colonial Government in reference to the matter and had received, in response, a statement of the character, as far as we can gather from this statement of Mr White, simply objecting to the final conclusion of any such proposed arrangement. I think it may be worth while in citing this response of Canada to take a glance at the terms in which Lord Salisbury made the communication to the Canadian Government which will be found in the Appendix, volume 3 of the British Case, United States No 2, 1890, page 196.

This is from the Marquis of Salisbury to Sir R. Morier.

Sir: The Russian Ambassador and the United States' Chargé d'Affaires called upon me this afternoon to discuss the question of the seal fisheries in Behring's Sea which had been brought into prominence by the recent action of the United States.

The United States Government had expressed a desire that some agreement should be arrived at between the three Governments for the purpose of prohibiting the slaughter of the seals during the time of breeding; and at my request, Mr de Staal had obtained instructions from his Government on that question. At this preliminary discussion it was decided provisionally, in order to furnish a basis for negotiation, and without definitively pledging our Governments, that the space to be covered by the proposed Convention should be the sea between America and Russia north of the 47° of latitude that the close time should extend from the 15th April to the 1st November; that during that time the slaughter of all seal should be forbidden; and vessels engaged in it should be liable to seizure by the

cruizers of any of the three Powers, and should be taken to the port of their own nationality for condemnation; that the traffic in arms, alcohol and powder should be prohibited in all the islands of those seas; and that, as soon as the three Powers had concluded a Convention they should join in submitting it for the assent of the other Maritime Powers of the Northern seas. The United "States Chargé d'Affaires" was exceedingly earnest in p ssing on us the importance of despatch on account of the inconceivable slaughter that had been and was still going on in these seas. He stated that, in addition to the vast quantity brought to market, it was a common practice for those engaged in the trade to shoot all seals they might meet in the open sea, and that of these a great number sank, so that their skins could not be recovered.

I am, etc.

SALISBURY.

The learned Arbitrators will now see the manner in which the negociations which were pending between the two Governments were notified to the Canadian Government.

**Sir Charles Russell.** — That was to Sir Robert Morier, and it is to Russia and not to Canada.

**The President.** — Yes. Sir Robert Morier was in Saint-Petersburg.

**Mr Foster.** — The same note was sent to Sir Lionel West.

**Mr Carter.** — Yes the same note was sent to Sir Lionel Sackville West at Washington.

**Sir Charles Russell.** — At Washington, certainly, but not in Canada.

**The President.** — Yes, that, Mr Carter, is not a communication made to Canada and you spoke of a communication made to the Canadian Government. Sir Sackville West was in Washington.

**Mr Carter.** — Yes he was in Washington, but the evidence that a communication was sent to Canada is not derived from this note of Lord Salisbury to Sir Robert Morier, and which was also sent to Sir Sackville West. — I am in error in stating as I have stated that that was the form in which Canada was apprised of the state of the negociations, but that at this time Canada was so apprised is stated in the communications which I will read.

**Mr Justice Harlan.** — You will find at page 199 of the British Case, Appendix, Volume 3 the letter from the Colonial Office in which Lord Knutsford for Canada acknowledges the receipt of a letter of the 28th transmitting a copy of the despatch addressed to Her Majesty's Ambassador in St-Petersburg.

**The President.** — Yes, the same despatch.

**Mr Foster.** — Yes.

**Mr Justice Harlan.** — And the answer is at page 212 of that Volume.

**Sir Charles Russell.** — The first answer, on page 200 is from Lord Lansdowne to Lord Knutsford on the 9th April.

**Mr Justice Harlan.** — I do not think that refers to the despatch: does it?

**Sir Charles Russell.** — Well I think it bears upon it.

**Mr Carter.** — In page 199 of the third volume to the Appendix to the

British Case U. S. No. 2, 1890, the following communication is found — this is from the British Colonial Office to the Foreign Office Downing street April 25th 1888.

I am directed by Lord Knutsford to acknowledge the receipt of your letter of the 20th instant, transmitting a copy of a dispatch addressed to Her Majesty's Ambassador at St. Petersburg respecting the proposed establishment of a close time for seals in Behring's Sea.

That despatch is n° 121 which is the very one of the Marquis of Salisbury to Sir Robert Morier so that it did get from the Foreign Office of the British Government to the Colonial Office and the receipt of it is thus acknowledged.

The dispatch continues :

In reply I am to inclose for the information of the Marquis of Salisbury, a copy of the extended telegram which was sent to the Governor-General of Canada on his Lordship's suggestion inquiring whether the Dominion Government were aware of any objection to the proposed arrangement. — I am also to inclose a copy of a despatch from Lord Lansdowne in the two concluding paragraphs of which he points out that the probable effect of the proposed close time on the operations of the Canadian sealers would be to exclude them completely from the rights which they have until lately enjoyed without question or molestation. In these circumstances it is probable that the United State's proposals may not be accepted by Canada without reserve and Lord Knutsford would suggest that pending the receipt of the observations of the Dominion Government in response to the invitation contained in his dispatch of the 8th March, referred to by Lord Lansdowne no final action should be taken in the matter.

We now perceive that is the conclusion of the negotiations.

**Sir Charles Russell.** — I beg your pardon ; the despatch there referred to from Lord Lansdowne is on the next page, the 9th of April.

**Mr Carter.** — Would you like me to read it?

**Sir Charles Russell.** — It precedes the one you have read in point of time; but I do not want to put you to any inconvenience about reading it.

**Mr Carter.** — Certainly. It is on page 200?

**Sir Charles Russell.** — Yes.

**Mr Carter.** — The enclosure?

**Sir Charles Russell.** — Yes.

**Mr Carter.** — No 1 or No 2?

**Sir Charles Russell.** — No 2.

**Mr Carter.** — This is from the Marquis of Lansdowne, who, I suppose, was then Governor General at the time.

**Sir Charles Russell.** — Yes.

**Mr Carter.** — To Lord Knutsford, who, I also suppose, was at the head of the Colonial Office in London?

**Sir Charles Russell.** — Yes.

**Mr Carter.** — This is from Lord Lansdowne to Lord Knutsford :

In reference to my despatch of the 29th March, I have the honour to inclose herewith copy of a telegram, dated the 5 the instant, from the Attorney General of British Columbia to Sir John Macdonald, acquainting him that my telegram, of

which a copy was sent to you in the above despatch, had been published in the provincial press as a warning to sealing vessels, and that there was reason to believe that these vessels had, in consequence of the intimation thus given, ceased to arm themselves for the purpose of resisting the cruisers of the United States. I have forwarded to you by this mail copies of a telegram received from Sir L. West in reference to the probable action of these cruisers during the present season, and of a telegram addressed to him by me in reply. I observe that the information obtained by Sir Lionel West from Mr Bayard, which is the same as that communicated to me in your telegraphic despatch of the 6th instant, is merely to the effect that no orders have been issued by the United States for the capture of British ships fishing in the Behring Sea. I need scarcely point out that this is not equivalent to an assurance that such vessels will not be molested except when found within the 3 mile limit, and that we are not informed whether any orders which have been already issued in this connection are or are not still in force.

That is in reference to another topic, that at the request of Great Britain instructions should be issued by the United States to its cruisers in the Behring Sea not to interfere with British vessels. It passes from that now.

I need scarcely point out that the close time for seals, referred to in your telegram, is created under a statute of the United States, which is not obligatory except upon the subjects of that Power. The proposal contained in the inclosure to your confidential despatch of the 8th March, 1888, for the adoption of a similar close season British fishermen is at present receiving the careful consideration of my Government. Such a close time could obviously not be imposed upon our fishermen without notice or without a fuller discussion than it has yet undergone. You are aware that, during the close time enforced by the United States' Statute, the seals, although protected from slaughter by the use of fire arms, may be killed in great numbers on their breeding-grounds by the persons who enjoy the monopoly of the trade under concessions from the United States' Government. The rest of the year these animals are, according to Mr Bayard's statement in his despatch of the 7th February, 1888, supposed to spend in the open sea south of the Aleutian island's, were they are probably widely scattered and difficult to find. It would appear to follow that, if concurrent Regulations based upon the American Law were to be adopted by Great Britain and the United States, the privileges enjoyed by the citizens of the latter Power would be little if at all curtailed, while British fishermen would find themselves completely excluded from the rights which until lately they have enjoyed without question or molestation. In making this observation, I do not desire to intimate that my Government would be averse to entering into a reasonable agreement for protecting the fur bearing animals of the Pacific coast from extermination, but merely that a one sided restriction such as that which appeared to be suggested in your telegram could not be suddenly and arbitrarily enforced by my Government upon the fishermen or this country.

It will now be perceived, let me repeat that the negotiations entered into between the United States and Great Britain, with every prospect at first of a favorable termination, had been arrested, in consequence of protests being received from the Canadian government. I do not complain of that, or suggest its impropriety. I merely state the fact that it was arrested at that point, and in consequence of that protest. The business continued in a condition of suspense, in consequence of that, for a very considerable time, so although, if I am rightly remembered, the United States on more than one occasion during the interim pressed the

British Government to give a decided answer, the next we hear of it, which is to the point I am engaged upon, is contained in Mr Phelps letter to Mr Bayard of September 12th, 1888. Mr Phelps had returned from his business in the United States, and again taken charge of the American Embassy in London, and his communication is as follows :

London, September 12th, 1888.

Sir : Referring to the subject of the Alaskan seal fisheries and to the previous correspondence on the subject between the department and this Legation, I have now the honor to acquaint you with the purport of the conversation which I held with Lord Salisbury in regard to it, on the 13 th of August. Illness, which has incapacitated me from business during most of the interval, has prevented me from laying it before you earlier. One of the objects of the interview I then sought with his Lordship was to urge the completion of the Convention between the United States, Great Britain and Russia, which under your instructions had previously been the subject of discussion between the Secretary for Foreign Affairs, the Russian Ambassador and myself.

This Convention, as I have before advised you, had been virtually agreed on verbally except in its details, and the Russian as well as the United States Government were desirous to have it completed. The consideration of it had been suspended for communication by the British Government with the Canadian Government, for which purpose an interval of several months had been allowed to elapse.

During this time, the attention of Lord Salisbury had been repeatedly called to the subject by this Legation, and on those occasions the answer received from him was that no reply from the Canadian authorities had arrived. In the conversation on the 13th above-mentioned, I again pressed for the completion of the Convention, as the extermination of the seals by Canadian vessels was understood to be rapidly proceeding. His Lordship in reply did not question the propriety or the importance of taking measures to prevent the wanton destruction of so valuable an industry, in which, as he remarked, England had a large interest of its own, but said that the Canadian government objected to any such restrictions, and that, until its consent could be obtained, Her Majesty's Government was not willing to enter into the Convention; that time would be requisite to bring this about, and that meanwhile the Convention must wait. It is very apparent to me that the British Government will not execute the desired Convention without the concurrence of Canada. And its equally apparent that the concurrence of Canada in any such arrangement is not to be reasonably expected. Certain Canadian vessels are making a profit out of the destruction of the seal in the breeding season in the waters in question, inhuman and wasteful as it is. That it leads to the speedy extermination of the animal is no loss to Canada, because no part of these seal fisheries belong to that country, and the only profit open to it in connexion with them is by destroying the seal in the open sea during the breeding time, although many of the animals killed in that way are lost, and those saved are worth much less than when killed at a proper time. Under these circumstances, the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these alternatives, it does not appear to me there should be the slightest hesitation, much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

Here is a valuable fishery, and a large, and if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countres interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighbouring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented

from defending ourselves against such depredations because the sea at a certain distance from the coast is free. The same line of argument would take under its protection piracy and the slave trade, when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coast. There are many things that cannot be allowed to be done on the open sea with impunity and against wich every sea is *mare clausum*. And the right of self defence, as to person and property, prevails there as fully as elsewhere. If the fish upon the Canadian coasts could be destroyed by scattering poison in the open sea adjacent, with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenceless in such a case? Yet that process would be no more destructive, inhuman and wanton than this. If precedents are wanting for a defence so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules. Especially should there be no hesitation in taking this course with the vessels of a colony which has for three years harassed the fisheries of our country with constant captures of vessels engaged in no violation of treaty or legal rights. The comity of nations has not deterred Canada from the persistent obstruction of justifiable and legitimate fishing by American vessels near its coasts. What principle of reciprocity precludes us from putting an end to a pursuit of the seal by Canadian ships which is unjustifiable and illegitimate? I earnestly recommend, therefore, that the vessels that have been already seized while engaged in this business be firmly held, and that measures be taken to capture and hold everyone hereafter found concerned in it. If further legislation is necessary, it can doubtless be readily obtained. There need be no fear but that resolute stand on this subject will at once put an end to the mischief complained of. It is not to be reasonably expected that Great Britain will either encourage or sustain her colonies in conduct which she herself concedes to be wrong and which is detrimental to her own interest as well as to ours. More than 10.000 people are engaged in London alone in the preparation of seal skins. And it is understood that the British Government has requested that clearances should not be issued in Canada for vessels employed in this business; but the request has been disregarded.

The learned Arbitrators will perceive that Mr Phelps at last came to the conclusion at this moment that the further progress of the negociation and any successful conclusion of it was impossible and impossible in consequence of the intervention of Canada and that any assent to regulations which might be proposed and which would be effective for the purpose would never receive the assent of the Canadian Government whether he was right or wrong in that opinion on his part is not to my present purpose and will perhaps be the subject of future discussion, but at all event: I think it safe to conclude from the correspondence that I have read to the Tribunal that the termination of the discussion at this point was arrested and arrested by the intervention of Canada. I do not find anywhere in this correspondence any suggestion on the part of Canada of another, or different, or modified, scheme designed to accomplish the same purpose, of preserving the seals, and different from the one acceded to by Mr Phelps and Lord Salisbury. I think there is no evidence that Canada had ever submitted any proposition of that sort.

This brings us to the conclusion of what I think may be properly enough called the first stage of this controversy. It is a stage which embraces leading features; the capture, first, by the cruisers of the United

States of British vessels engaged in pelagic sealing ; the objection and the protest of the British Government, the ground of the objection being that it was an attempt to enforce a Municipal Law of the United States upon the high seas ; an avoidance of discussion of that question by Mr Bayard ; a suggestion by him that the case was one of a peculiar property interest, and a case for the exercise of an exceptional marine jurisdiction, but that it would be wisest and best to avoid a useless and perhaps irritating and abortive discussion on these questions of right if the attention of nations could be called to the great fact that here was a useful race of animals, and an important blessing given to mankind, threatened with extermination by certain practices, and that, therefore, it should be the duty, as it was certainly the interest of all nations to join mutually in Regulations designed to prevent the mischief. It includes the further feature that negotiations were set on foot for the purpose of carrying out these abstract intentions of the American Minister ; that they were received promptly in the most friendly manner and in the same spirit by Lord Salisbury, the British Secretary for Foreign Affairs ; that an agreement was substantially concluded upon between those parties, which would have been carried doubtless into effect but for the objections interposed by Canada, a dependence of the British Empire, which was presumably, and indeed in fact, doubly interested in this carrying on of pelagic sealing. That, so far as appears, no different scheme, no modified scheme designed to carry out the same objection was ever formulated by the Government of Canada ; but that it remained in its condition of simple protest and objections to any scheme of prohibition such as had been presented ; and the final cessation — the apparently final cessation — of the negotiations in consequence of that objection. Those are the principal features of what I have thought fit to call the first stage of this controversy. Now let me pass to the second.

**Senator Morgan.** — Do you understand, Mr Carter, that a British subject, residing in Canada, has the right, in the diplomatic sense or in the international sense, to the protection of two Governments?

**Mr Carter.** — The Canadian?

**Senator Morgan.** — And the British?

**Mr Carter.** — I never thought of that ; and any opinion that I might give upon it would be of little value now. In the course of such reflections as I have given to these questions, it has not yet occurred to me that that was material.

**Senator Morgan.** — The difficulty, I suggest, that occurs to my mind is this : I can well understand how a British subject is entitled to the protection of the British Crown and Government in respect of international relations ; but I do not understand how the Canadian Government as a Government can interpose to protect a British subject within Canada as, for instance against an avowed policy of the British Government.

**Mr Carter.** — I have not supposed that the Canadian Government was such a Government as could in any sovereign capacity or diplomati-

cally communicate with other governments. I had supposed that the Colonies of the British Empire occupied substantially some such position as the citizens of the American Union occupy toward the American Government, and that the citizens of Canada in reference to those defences which they desire against the acts of other Governments would be obliged to appeal to the Imperial authority — that their own Government was not able to give them any protection — they might appeal to their own Go vernment in the first instance, but that their Government, I suppose, would have to appeal in turn to the Imperial authority. That is what I should suppose the state of the case was ; but I may be in error about that.

**Sir J. Thompson.** — Like most British subjects, the Canadian subjects have a right to express an opinion on matters affecting their own interests, and the Canadian Government have the means of expressing that to the British Government.

**Mr Carter.** — Yes, I should suppose so. A Canadian citizen in Canada has the right of every subject of Great Britain to express his opinion on all subjects of British policy, especially upon particular questions that should happen to bear heavily upon him and his own Government furnishes no doubt an instrumentality by which he can complain.

**Sir J. Thompson.** — And by which he can claim its protection.

**Mr Carter.** — Yes, and by which he can claim its protection. I should say so.

There were some incidental matters connected with this first stage of the controversy and which occurred during the discussion in relation to it which make a figure but an unimportant figure in it. For instance there were claims for damages made by the British Government growing out of these seizures and those claims were persisted in and from time to time made the subject of demand and diplomatic communications. In the next place there were further seizures made in the year 1888 but the vessels which were seized in 1888 were all released from seizure with the exception of one which was the " W. P. Sayward ".

**Sir Richard Webster.** — It was 1887 not 1888.

**Mr Carter.** — Yes, I mean in 1887 and not in 1888. There were several, five I think, British vessels seized in 1887 and all of them were released. Upon what grounds they were released whether technical or for the reason that it was thought that the pending negociations could better advanced if causes of irritation were removed I will not undertake to say, but they were in fact released.

**Sir Charles Russell.** — There were seven seizures.

**Mr Carter.** — There were seven seizures, and my statement is true that all of them were released, but one, I think, which was the case of the " W.-P. Sayward ", was carried in libelled at Sitka, I suppose, and condemned, and from the decree condemning her an appeal was taken to the Supreme Court of the United States, and the question of the rightfulness of the seizure was sought to be raised. I should say that it was not an appeal that was taken, and I am in error in stating that.

**Lord Hannen.** — Yes, that is what I was just observing, I think it was by way of prohibition.

**Mr Carter.** — Yes, the time for appealing had been allowed to pass, and no appeal could be taken, but Counsel thereupon resorted to another method which they thought might be effective to raise the question whether these seizures were rightful or not, and determine it as a judicial question. They took the ground that the seizure being outside of the municipal jurisdiction of the United States, and standing upon a law of the United States, the Court was without jurisdiction, and, therefore they applied to the Supreme Court of the United States for a writ of prohibition to the inferior tribunal to prevent it executing the decree which had been made.

The application to the United States Supreme Court, for this writ of prohibition was denied, and thus the Supreme Court of the United States Supreme Court dissaffirmed the right of this applicant to raise this question in such a way. It is unnecessary for me to go particularly into the grounds upon which that opinion was based, especially because one of the learned Arbitrators happened to be one of the Justices sitting on the Supreme Court Bench at that time and participated in the decision so that he can, of course, fully acquaint the learned Arbitrators of the grounds on which the action of the Supreme Court action was had.

And finally, in stating the features of this first stage of the controversy, let me say that while, so far as the representatives of Great Britain and the United States were concerned, the attempt at an accommodation by means of an agreed system of regulations failed, yet all parties were at all times agreed upon the prompt necessity and obligation, as it were, of both governments, to take some measure or other which should have the effect of preserving the seals from destruction.

Now let me pass to the second stage of the controversy. On the 4th of March, 1889 Mr Harrison succeeded Mr Cleveland in the office of President, and, of course, as happens on these occasions in America, there was a sort of revolution in the administration of the various Departements. Mr Bayard was succeeded in the State Department by Mr Blaine, and there was a new American Minister to London. President Harrison, as required by the Statutes of the United States, very soon after his inauguration, made the general proclamation required by law, prohibiting all pursuit of seals in the waters of Alaska, and presumably instructions were also given to the United States Cruisers to put the provisions of the law into force. It will be recollected that some two years had now elapsed since the beginning of negotiations upon this subject — nearly two years. They were initiated in the summer of 1887 and the spring of 1889 had now arrived.

The proclamation having been made and the instructions given, they were followed early in the sealing season by the arrest of British sealers again, and of course the action was followed by renewed protests on the part of the British Government. I call the attention of the Tribunal to the letter of Mr Edwardes to Mr Blaine. Mr Edwardes was then in charge of

the British Mission at Washington. He was actually at Bar Harbor. The letter is on page 195 in the first volume of the Appendix of the United States Case :

Bar Harbor, August 24, 1889.

SIR : In accordance with instructions which I have received from Her Majesty's Principal Secretary of State for Foreign Affairs, I have the honor to state to you that repeated rumors have of late reached Her Majesty's Government that United States cruisers have stopped, searched, and even seized British vessels in Behring Sea outside of the three mile limit from the nearest land. Although no official confirmation of these rumors has reached Her Majesty's Government, there appears to be no reason to doubt their authenticity.

I am desired by the Marquis of Salisbury to inquire whether the United States Government are in possession of similar information, and further, to ask that stringent instructions may be sent by the United States Government, at the earliest moment, to their officers, with the view to prevent the possibility of such occurrences taking place.

In continuation of my instruction I have the honor to remind you that Her Majesty's Government received very clear assurances last year from Mr Bayard, at that time Secretary of State, that pending the discussion of the general questions at issue no further interference should take place with British vessels in Behring Sea.

In conclusion, the Marquis of Salisbury desires me to say that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared on his return to Washington in the autumn to discuss the whole question, and Her Majesty's Government wish to point out to the United States Government that a settlement cannot but be hindered by any measures of force which may be resorted to by the United States.

I have, etc.,

H. G. EDWARDES.

The learned Arbitrators will see what the situation was at this particular time. The vessels which had been seized in 1887, with the exception of one the " Sayward ", which I have mentioned, had been released. The negotiations were pending and during 1888 no new seizures had been made. What that was in consequence of it is not important to see. I do not know that I know. It may have been that such a course was thought on the part of the American Government to be likely to cause irritation which would tend to prevent the accommodation which they sought for the question. At all events, none were made in 1888.

Mr Cleveland and Mr Bayard, his Secretary of State, under whose auspices that policy of conciliation had been adopted and pursued, were now out of office. They were succeeded by President Harrisdon and Mr Blaine as his Secretary of State, of course under the obligation to enforce the laws and policy of the United States. The negotiations for a settlement appeared to be in a state of suspended animation, and with no particular prospect of its being renewed; and therefore, the course of the United States under these circumstances was to readopt the policy of enforcing the prohibition of pelagic sealing. That of course brought the subject again to the attention of the British Government and led to protests on its part. Those protests included the suggestion that at the former period assurances had been given by Mr Bayard that no further seizures would be made pending the discussion. It is not important to

my purpose here, but I must remark that it is denied that such assurances were given, and I do not think there is any evidence of them. Lord Salibury doubtless thougth so.

In the next place the suggestion of the British Government was that instructions should be given to prevent any recurrence of those seizures. Well, this suggestion could not very well be made in the then existing state of business, without some desire or intention of reopening the negotiations for the adjustment of the matter, and therefore this suggestion is also contained : " The Marquis of Salisbury desires me to say that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared on his return to Washington in the autumn, to discuss the whole question, and Her Majesty's Government wish to point out to the United States' Government that the settlement cannot but be hindered by any measures of force which may be resorted to by the United States ".

The business was new to Mr Blaine, and the whole subject doubtless new to him. His answer is short :

*Mr Blaine to Mr Edwardes*

Bar Harbor, August 24, 1880.

Sir : I have the honor to acknowledge the receipt of your communication of this date, conveying to me the intelligence " that repeated rumors have of late reached Her Majesty's Government that United States cruisers have stopped, searched, and even seized British vessels in Behring Sea outside the 3 mile limit from the nearest land." And you add that, " although no official confirmation of these rumors has reached Her Majesty's Government, there appears to be no reason to doubt their authenticity. "

In reply I have the honor to state that the same rumors, probably based on truth, have reached the Government of the United States, but that up to this date there has been no official communication received on the subject.

It has been and is the earnest desire of the President of the United States to have such an adjustment as shall remove all possible ground of misunderstanding with Her Majesty's Government concerning the existing troubles in the Behring Sea; and the President believes that the responsibility for delay in the adjustment can not be properly charged to the Government of the United States.

I beg you will express to the Marquis of Salisbury the gratification with which the Government of the United States learns that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared, on his return to Washington in the autumn, to discuss the whole question. It gives me pleasure to assure you that the Government of the United States will endeavor to be prepared for the discussion, and that, in the opinion of the President, the points at issue betwen the two Governments are capable of prompt ajustment on a basis entirely honorable to both.

I have, etc.,

James G. Blaine.

But Mr Edwardes pressed for a more categorical answer to his note. On the 25 th of August he writes :

*Mr Edwardes to Mr Blaine.*

Bar Harbor, August 25, 1880.

Sir : I had the honor to receive yesterday your note in which you have been good enough to inform me, with respect to the repeated rumors which have of late

reached Her Majesty's Government of the search and seizures of British vessels in Behring Sea by United States cruisers, that the same rumours, probably based on truth, have reached the United States Government, but that up to this date there has been no official communication received on the subject.

At the same time you have done me the honor to inform me that it has been and is the earnest desire of the President of the United States to have such an adjustment as shall remove all possible ground of misunderstanding with Her Majesty's Government concerning the existing troubles in the Behring Sea; and that the President believes that the responsability for delay in that adjustment cannot be properly charged to the Government of the United States.

You request me at the same time to express to the Marquis of Salisbury the gratification with which the Government of the United States learns that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared, on his return to Washington in the autumn, to discuss the whole question, and you are good enough to inform me of the pleasure you have in assuring me that the Government of the United States will endeavor to be prepared for the discussion, and that, in the opinion of the President, the points at issue between the two Governments are capable of prompt adjustment on a basis entirely honorable to both.

I shall lose no time in bringing your reply to the knowledge of Her Maje'stys Government, who, while awaiting an answer to the other inquiry I had the honor to make to you, will, I feel confident, receive with much satisfaction the assurances which you have been good enough to make to me in your note of yesterday's date.

I have, etc.,

H. G. Edwardes.

This is not the note in which I supposed he was pressing for a reply, and I should not have read it.

**Mr Foster.** — It is the next letter.

**Mr Carter.** — It is the next note, which I will read :

*Mr Edwardes to Mr Blaine.*

Washington, September 12, 1889.

My Dear Mr Blaine : I should be very much obliged if you would kindly let me know when I may expect an answer to the request of Her Majesty's Government, which I had the honor of communicating to you in my note of the 24th of August, that instructions may be sent to Alaska to prevent the possibility of the seizure of British ships in Behring Sea. Her Majesty's Government are earnestly awaiting the reply of the United States Government on this subject, as the recent reports of seizures having taken place are causing much excitement both in England and in Canada.

I remain, etc.,

H. C. Edwardes.

Mr Blaine, answers that :

*Mr Blaine to Mr Edwardes.*

Bar Harbor, September 14, 1889.

Sir : I have the honor to acknowledge the receipt of your personal note of the 12th instant, written at Washington, in which you desire to know when you may expect an answer to the request of Her Majesty's Government, " that instructions may be sent to Alaska to prevent the possibility of the seizure of British ships in Behring Sea. "

I had supposed that my note of August 24 would satisfy Her Majesty's Government of the President's earnest desire to come to a friendly agreement touching

all matters at issue between the two Governments in relation to Behring Sea, and I had further supposed that your mention of the official instruction to Sir Julian Pauncefote to proceed, immediately after his arrival in October to a full discussion of the question, removed all necessity of a preliminary correspondence touching its merits.

Referring more particularly to the question of which you repeat the desire of your Government for an answer, I have the honor to inform you that a categorical response would have been and still is impracticable — unjust to this Government, and misleading to the Government of Her Majesty. It was therefore the judgement of the President that the whole subject could more wisely be remanded to the formal discussion so near at hand which Her Majesty's Government has proposed, and to which the Government of the United States has cordially assented.

It is proper, however, to add that any instruction sent to Behring Sea at the time of your original request, upon the 24th of August, would have failed to reach those waters before the proposed departure of the vessels of the United States.

I have, etc.,

JAMES G. BLAINE.

These conclusions, it will certainly be agreed, are diplomatic — one party pressing for an answer to a question, and the other gently deferring it, and looking to a period when a more satisfactory discussion should be brought on.

**Sir Charles Russell.** — The next letter from Lord Salisbury is important.

**Mr Carter.** — I have not marked it as important, but if you think so Sir Charles, I will be glad to read it.

**Sir Charles Russell.** — I should be glad if you would. It is on the same page, 197.

**Mr Carter.** — I will do so. It is from Lord Salisbury to Mr Edwardes and was left at the Department of State.

*The Marquis of Salisbury to Mr Edwardes.*

[Left at the Department of State by Mr Edwardes.]

Foreign Office, October 2, 1889.

SIR: At the time when the seizures of British ships hunting seals in Behring's Sea during the years 1886 and 1887 were the subjects of discussion the Minister of the United States made certain overtures to Her Majesty's Government with respect to the institution of a close time for the seal fishery, for the purpose of preventing the extirpation of the species in that part of the world. Without in any way admitting that considerations of this order could justify the seizure of vessels which were transgressing no rule of international law, Her Majesty's Government were very ready to agree that the subject was one deserving of the gravest attention on the part of all the governments interested in those waters.

The Russian Government was disposed to join in the proposed negotiations, but they were suspended for a time in consequence of objections raised by the Dominion of Canada and of doubts thrown on the physical data on which any restrictive legislation must have been based.

Her Majesty's Government are fully sensible of the importance of this question, and of the great value which will attach to an international agreement in respect to it, and Her Majesty's representative will be furnished with the requisite instructions in case the Secretary of State should be willing to enter upon the discussion.

You will read this dispatch and my dispatch No 205, of this date, to the Secre-

tary of State, and, if he should desire it, you are authorized to give him copies of them.

I am, etc.,

SALISBURY.

Yes, it is quite important, and I am obliged to my learned friend for the suggestion that it be read.

These demands by the British Government, occasioned by the new seizures having been made, and this sort of diplomatic correspondence having been begun, during which preliminaries the new Government of the United States was occupied in considering the proper attitnde to be taken, Mr Blaine, finally, on the 22d of January 1890 addressed Sir Julian Pauncefote and delivered to him the result of the consideration and reflection which President Harrison had given to the subject. This is on the 22d of January 1890.

**Sir Charles Russell.** — If you will pardon me one moment, you have only read one of those two despatches to which I referred. The first was the one I requested and the other immediately followed it.

**Mr Carter.** — I did not intend to read it unless you desired it.

**Sir Charles Russell.** — Not at all. Do not go to that trouble.

**Mr Carter.** — I now read the letter from Mr Blaine. January 22, 1890:

*Mr Blaine to Sir Julian Pauncefote.*

Department of State, Washington, January 22, 1890.

SIR: Several weeks have elapsed since I had the honor to receive through the hands of Mr Edwardes copies of two dispatches from Lord Salisbury complaining of the course of the United States revenue-cutter *Rush* in intercepting Canadian vessels sailing under the British flag and engaged in taking fur seals in the waters of the Behring Sea.

Subjects which could not be postponed have engaged the attention of this Department and have rendered it impossible to give a formal answer to Lord Salisbury until the present time.

In the opinion of the President, the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that was in itself *contra bonos mores*, a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the treaty by which the Alaskan territory was transferred to the United States. The weighty considerations growing out of the acquisition of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view, while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government.

It can not be unknown to Her Majesty's Government that one of the most valuable sources of revenue from the Alaskan possessions is the fur-seal fisheries of the Behring Sea. Those fisheries had been exclusively controlled by the Government of Russia, without interference or without question, from their original discovery until the cession of Alaska to the United States in 1867. From 1867 to 1886 the possession in which Russia had been undisturbed was enjoyed by this Government

also. There was no interruption and no intrusion from any source. Vessels from other nations passing from time to time through Behring Sea to the Arctic Ocean in pursuit of whales had always abstained from taking part in the capture of seals.

This uniform avoidance of all attempts to take fur seals in those waters had been a constant recognition of the right held and exercised first by Russia and subsequently by this Government. It has also been the recognition of a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to their extinction. This is not only the well-known opinion of experts, both British and American, based upon prolonged observation and investigation, but the fact had also been demonstrated in a wide sense by the well-nigh total destruction of all seal fisheries except the one in the Behring Sea, which the Government of the United States is now striving to preserve, not altogether for the use of the American people but for the use of the world at large.

The killing of seals in the open sea involves the destruction of the female in common with the male. The slaughter of the female seal is reckoned as an immediate loss of three seals, besides the future loss of the whole number which the bearing seal may produce in the successive years of life. The destruction which results from killing seals in the open sea proceeds, therefore, by a ratio which constantly and rapidly increases, and insures the total extermination of the species within a very brief period. It has thus become known that the only proper time for the slaughter of seals is at the season when they betake themselves to the land, because the land is the only place where the necessary discrimination can be made as to the age and sex of the seal. It would seem, then, by fair reasoning, that nations not possessing the territory upon which seals can increase their numbers by natural growth, and thus afford an annual supply of skins for the use of mankind, should refrain from the slaughter in open sea where the destruction of the species is sure and swift.

After the acquisition of Alaska the Government of the United States through competent agents working under the direction of the best experts, gave careful attention to the improvement of the seal fisheries. Proceeding by a close obedience to the laws of nature, and rigidly limiting the number to be annually slaughtered, the Government succeeded in increasing the total number of seals and adding correspondingly and largely to the value of the fisheries. In the course of a few years of intelligent and interesting experiment the number that could be safely slaughtered was fixed at 100,000 annually. The Company to which the administration of the fisheries was intrusted by a lease from this Government has paid a rental of $ 50,000 per annum, and in addition thereto $ 262 1/2 per skin for the total number taken. The skins were regularly transported to London to be dressed and prepared for the markets of the world, and the business had grown so large that the earnings of English labourers, since Alaska was transferred to the United States, amount in the aggregate to more than $ 12,000,000.

The entire business was then conducted peacefully, lawfully, and profitably — profitably to the United States for the rental was yielding a moderate interest on the large sum which this Government had paid for Alaska, including the rights now at issue; profitably to the Alaskan Company, which, under governmental direction and restriction, had given unwearied pains to the care and development of the fisheries : profitably to the Aleuts, who were receiving a fair pecuniary reward for their labours, and were elevated from semi savagery to civilization and to the enjoyment of schools and churches provided for their benefit by the Government of the United States; and, last of all, profitably to a large body of English labourers who had constant employment and received good wages.

This, in brief, was the condition of the Alaska fur-seal fisheries down to the year 1886. The precedents customs and rights had been established and enjoyed, either by Russia or the United States, for nearly a century. The two nations were were the only powers that owned a foot of land on the continents that bordered or on the islands included within, the Behring waters where the seals resort to breed. Into this peaceful and secluded field of labor, whose benefits were so equitably shared by the native Aleuts of the Pribilof Islands, by the United States, and

by England, certain Canadian vessels in 1886 asserted their right to enter, and by their ruthless course to destroy the fisheries and with them to destroy also the resulting industries which are so valuable. The Government of the United States at once proceeded to check this movement, which, unchecked, was sure to do great and irreparable harm.

It was cause of unfeigned surprise to the United States that Her Majesty's Government should immediately interfere to defend and encourage (surely to encourage by defending) the course of the Canadians in disturbing an industry which had been carefully developed for more than ninety years under the flags of Russia and the United States — developed in such a manner as not to interfere with the public rights or the private industries of any other people or any other person.

Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for more than ninety years? Upon what grounds did her Majesty's Government defend in the year 1886 a course of conduct in the Behring Sea which she had carefully avoided ever since the discovery of that sea? By what reasoning did Her Majesty's Government conclude that an act may be committed with impunity against the rights of the United States which had never been attempted against the same rights when held by the Russian Empire?

So great has been the injury to the fisheries from the irregular and destructive slaughter of seals in the open waters of the Behring Sea by Canadian vessels, that whereas the Government had allowed 100,000 to be taken annually for a series of years, it is now compelled to reduce the number to 60,000. If four years of this violation of natural law and neighbour's rights has reduced the annual slaughter of seal by 40 per cent, it is easy to see how short a period will be required to work the total destruction of the fisheries.

The ground upon which Her Majesty's Government justifies, or at least defends the course of the Canadian vessels, rests upon the fact that they are committing their acts of destruction on the high seas, viz, more than 3 marine miles from the shore line. It is doubtful whether Her Majesty's Government would abide by this rule if the attempt were made to interfere with the pearl fisheries of Ceylon, which extend more than 20 miles from the shore line and have been enjoyed by England without molestation ever since their acquisition. So well recognized, is the British ownership of those fisheries, regardless of the limit of the three-mile line, that Her Majesty's Government feels authorized to sell the pearl-fishing right from year to year to the highest bidder. Nor is it credible that modes of fishing on the Grand Banks, altogether practicable but highly destructive, would be justified or even permitted by Great Britain on the plea that the vicious acts were committed more than 3 miles from shore.

There are, according to scientific authority, " great colonies of fish " on the " Newfoundland banks ". These colonies resemble the seats of great populations on land. They remain stationary, having a limited range of water in which to live and die. In these great " colonies " it is, according to expert judgment, comparatively easy to explode dynamite or giant powder in such manner as to kill vast quantities of fish, and at the same time destroy countless numbers of eggs. Stringent laws have been necessary to prevent the taking of fish by the use of dynamite in many of the rivers and lakes of the United States. The same mode of fishing could readily be adopted with effect on the more shallow parts of the banks, but the destruction of fish in proportion to the catch, says a high authority, might be as great as ten thousand to one. Would Her Majesty's Government think that so wicked an act could not be prevented and its perpetrators punished simply because it had been committed outside of the 3 mile line ?

Why are not the two cases parallel? The Canadian vessels are engaged in the taking of fur seal in a manner that destroys the power of reproduction and insures the extermination of the species. In exterminating the species an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons. By the employment of dynamite on the banks it is not probable that the total destruction of fish could be accomplished, but a serious diminution of a valuable food for man might assuredly result. Does Her Majesty's

Government seriously maintain that the law of nations is powerless to prevent such violation of the common rights of man? Are the supporters of justice in all nations to be declared incompetent to prevent wrongs so odious and so destructive?

In the judgment of this Government the law of the sea is not lawlessness. Nor can the law of the sea and the liberty which it confers and which it protects be perverted to justify acts which are immoral in themselves, which inevitably tend to results against the interests and against the welfare of mankind. One step beyond that which Her Majesty's Government has taken in this contention, and piracy finds its justification. The President does not conceive it possible that Her Majesty's Government could in fact be less indifferent to these evil results than is the Government of the United States. But he hopes that Her Majesty's Government will, after this frank expression of views, more readily comprehend the position of the Government of the United States touching this serious question. This Government has been ready to concede much in order to adjust all differences of view, and has, in the judgment of the President, already proposed a solution not only equitable but generous. Thus far Her Majesty's Government has declined to accept the proposal of the United States. The President now awaits with deep interest, not unmixed with solicitude, any proposition for reasonable adjustment which Her Majesty's Government may submit. The forcible resistance to which this Government is constrained in the Behring Sea is, in the President's judgment, demanded not only by the necessity of defending the traditional and long established rights of the United States, but also the rights of good government and of good morals the world over.

In this contention the Government of the United States has no occasion and no desire to withdraw or modify the positions which it has at any time maintained against the claims of the Imperial Government of Russia. The United States will not withhold from any nation the privileges which it demanded for itself when Alaska was part of the Russian Empire. Nor is the Government of the United States disposed to exercise in those possessions any less power or authority than it was willing to concede to the Imperial Government of Russia when its sovereignty extended over them. The President is persuaded that all friendly nations will concede to the United States the same rights and privileges on the lands and in the waters of Alaska which the same friendly nations always conceded to the Empire of Russia.

I have, etc.,

JAMES G. BLAINE.

**The President.** — If you please, Mr Carter, continue your argument tomorrow.

Tribunal adjourned until Thursday, April 13th at 11.30 A. M.

**The President.** — Mr Carter, if you will kindly continue your argument, we will hear you with pleasure.

**Mr Carter.** — Mr President, when the Tribunal adjourned yesterday I was engaged in explaining the leading features of what I called the second stage of the controversy which began with the beginning of the Administration of President Harrison; and I had in substance brought out or endeavoured to bring out these features, that, for a considerable period of time prior to the accession of President Harrison, the negotiations which had been entered into between the two Governments had been interrupted in consequence of the objections of Canada, and they were in a state of suspended animation, so to speak, with no immediate prospect of their being renewed; that, under these circumstances, President Harrison felt it his duty to issue the proclamation required of him by Law forbidding all pelagic sealing in the waters of Alaska; that the proclamation was followed by additional seizures, and these seizures brought renewed protests from the British Government, and thus the controversy was renewed; that the demands of the British Government consequent upon their seizure were repeated from time to time, and some pressure was exerted upon the United States for the purpose of inducing the Government to issue instructions to prevent the further interference by United States Cruisers with British vessels engaged in pelagic sealing; that, while this was going on, the Government of President Harrison took the whole subject into consideration, and, finally, the views of the Government were expressed in a note by Mr Blaine addressed to Sir Julian Pauncefote, with the reading of which the session of yesterday concluded. The Tribunal will have observed that Mr Blaine, in this quite long note of his, stated rather fully and completely the substantial ground upon which the Government of the United States placed itself. Those grounds had not been theretofore stated: they had been hinted at and intimated by Mr Secretary Bayard in his instructions to the American Ministers designed to call the attention of Foreign Governments to the subject in order and with the view that some amicable adjustment of the question might be made without a resort to any discussion of questions upon which differences of opinion might be entertained. He avoided, in other words, all discussion of the grounds of right upon which the United States placed itself.

That discussions of the grounds of right, that statements of the attitude and position of the United States Government were made for the first time by Mr Blaine in the note which I read at the close of yesterday's session,

and, in substance, those grounds were, that the United States were carrying on an industry in relation to these seals, caring for them, cherishing them, taking the annual increase from the herd and preserving the stock on the Pribilof Islands. That that was an industry advantageous to itself, advantageous to its lessees, but what was of much more importtance, advantageous to mankind. That the pursuit of pelagic sealing threatened that industry with destruction, and threatened not only the interests of the United States, but also the larger interests of mankind. That it was a destructive pursuit essentially and absolutely wrong, and should not be permitted, therefore, and that the United States had a right to prevent it, when, added to its essentially destructive character, it had this injurious effect upon a special industry and right of the United States. Those were the grounds upon which the case of the United States was put by Mr Blaine, and put by him, as I have already said, for the first time in that full and complete form.

After receipt of that note by Sir Julian Pauncefote he addressed the following brief communication to Mr Blaine which is found in page 204 of the American Appendix :

Washington, February 10th 1890.

Sir : Her Majesty's Government have had for some time under their consideration the suggestion made in the course of our interviews on the question of the Seal Fisheries in Behring Sea that it might expedite a settlement of the tripartite negociation respecting the establishment of a close time for those Fisheries which was commenced in London in 1888, but which was suspended owing to various causes should be resumed at Washington.

I now have the honor to inform you that Her Majesty's Government are willing to adopt this suggestion, and if agreeable to your Government will take steps concurrently with them to invite the participation of Russia in the renewed negociaonist.

Here is a suggestion from the Government of Great Britain that the original negociations, which had been interrupted for various causes, as is said, should be renewed in the city of Washington and this suggestion was accepted by Mr Blaine.

After that it appears that some verbal communications, or some communications — personal communications had taken place in Washington between Mr Blaine and Sir Julian, respecting the resumption of the negotiations and the probability or possibility that they might be brought to a successful issue, Mr Blaine had suggested in the course of those personal communications that he thought it quite impossible that the assent of Canada would ever be obtained to any Regulations, or to any settlement which would have the designed effect of protecting the seals from extermination. He expressed those fears to him, I suppose I may presume, as it seems fairly presumable, that Sir Julian had answered those suggestions by intimating that he was of a contrary opinion, and that it was not impossible for some arrangement to be come to, which would be satisfactory to Canada on the subject. This rather called upon Sir Julian to submit, himself, some proposition which would be presumably agreeable

to Canada and which he might suppose would not be unacceptable to the United States Government. Consequently, in April 1890, the date is not given, but it appears to have been received on the 30th of April, Sir Julian addresses Mr Blaine thus on page 204.

**Sir Charles Russell.** — The date is the 29th, I think.

**Mr Carter.** — Very well :

Dear Mr Blaine, At the last sitting of the Conference on the Behring Sea Fisheries question, you expressed doubts, after reading the memorandum of the Canadian Minister of Marine and Fisheries, which by your courtesy has since been printed, whether any arrangement could be arrived at that would be satisfactory to Canada. You observed that the proposals of the United States had now been two years before Her Majesty's Government; that there was nothing further to urge in support of it; and you invited me to make a counter proposal on their behalf. To that task I have most earnestly applied myself, and while fully sensible of its great difficulty owing to the conflict of opinion and of testimony which has manifested itself in the course of our discussions, I do not despair of arriving at a solution which will be satisfactory to all the Governments concerned. It has been admitted from the commencement that the sole object of the negotiation is the preservation of the fur-seals species for the benefit of mankind, and that no considerations of advantage to any particular nation, or of benefit to any private interest, should enter into the question.

I call the attention of the learned Arbitrators particulary to that language. They are golden words, and rightly express what should have been, and should be, at all times the main purpose, and the main object in any discussion of this question or in any efforts to bring about an accommodation.

Such being the basis of negotiation it would be strange indeed if we should fail to devise the means of solving the difficulties which have unfortunately arisen. I will proceed to explain by what method this result can, in my judgment, be attained. The great divergence of views which exists as to whether any restrictions on pelagic sealing are necessary for the preservation of the fur-seal species, and, if so, as to the character and extent of such restriction, renders if impossible in my opinion to arrive at any solution which would satisfy public opinion either in Canada or Great Britain, or in any country which may be invited to accede to the proposed arrangement without a full enquiry by a mixed commission of experts, the result of whose labours and investigations in the region of the seal fishery would probably dispose of all the points in dispute. As regards, the immediate necessities of the case, I am prepared to recommend to my Government for their approval and acceptance certain measures of protection which might be adopted provisionally and without prejudice to the ultimate decision on the points to be investigated by the Commission. Those measures which I will explain later on would effectually remove all reasonable apprehension of any depletion of the fur-seal species, at all events pending the report of the Commission. It is important in this relation to note that while it has been contended on the part of the United States Government that the depletion of the fur-seal species has already commenced, and that even the extermination of the species is threatened within a measurable space of time, the latest reports of the United States Agent, Mr Tingle, are such as to dissipate all such alarms. Mr Tingle in 1887 reported that the vast number of seals was on the increase, and that the condition of all the rookeries could not be better. In his later report, dated July 31st 1888, he wrote as follows.

"I am happy to be able to report that although late landing the breeding rookeries are filled out to the lines of measurement heretofore made, and some of them

much beyond those lines, showing conclusively that seal life is not being depleted, but is fully up to the estimate given in my report of 1887."

Mr Elliott who is frequently alluded to as a great authority on the subject, affirms that such is the natural increase of the fur-seal species that these animals, were they not preyed upon by killer whales, [*Orca gladiator*] sharks, and other submarine foes, would multiply to such an extent that Behring sea itself could not contain them. The Honorable Mr Tupper has shown in his memorandum that the destruction of seals caused by pelagic sealing is insignificant in comparison with that caused by their natural enemies, and gives figures exhibiting the marvellous increase of seals, in spite of the depredations complained of. Again the destructive nature of the modes of killing seal by spears and fire arms has apparently been greatly exaggerated as may be seen from the affidavits of practical seal hunters which I annex to this letter, together with a confirmatory extract from a paper upon the fur seal fisheries of the Pacific Coast and Alaska, prepared and published in San Francisco, and designed for the information of Eastern Unided States Senators and Congress men.

The Canadian Government estimate the number of seals so wounded and killed, and not recovered, at 6 per cent, In view of the facts above stated it is improbable that, pending the result of the enquiry which I have suggested, any appreciable diminution of the fur-seal species should take place, even if the existing conditions of pelagic sealing were to remain unchanged. But in order to quiet all apprehension on that score, I would propose the following provisional Regulations —. (1) That pelagic sealing should be prohibited in the Behring Sea, the Sea of Okhotsk and the adjoining waters during the months of May and June and during the months of October, November and December, which may be termed the migration periods of the fur-seal. (2) That all sealing vessels should be prohibited from approaching the breeding islands within a radius of ten miles. These Regulations would put a stop to the two practices complained of as tending to exterminate the species — first, the slaughter of female seals with young during the migration period, especially in the narrow part of the Aleutian islands; secondly, the destruction of female seals by marauders surreptitiously landing on the breeding islands under cover of the dense fogs which almost continuously prevail in that locality during the summer. Mr Taylor, an other agent of the United States Government, asserts that the female seals called cows go out from the breeding islands every day for food. The following is an extract from his evidence.

"The cows go 10 and 15 miles and even further: I do not know the average of it, and they are going and coming all the morning and eveniug. The sea is black with them round the islands. If there is a little fog, and they get out half a mile from shore, we cannot see a vessel 100 yards even. The vessels themselves lay around the islands there, where they pick up a good many seal and there is where the killing of cows occurs when they go ashore."

Whether the female seals go any distance from the islands in quest of food, and if so to what distance, are questions in dispute, but pending their solution the Regulation which I propose against the approach of sealing vessels within 10 miles of the islands for the prevention of surreptitious landing practically meets Mr Taylors complaint, be it well founded or not, to the fullest extent; for owing to the prevalence of fogs, the risk of capture within a radius of 10 miles will keep vessels off at a much greater distance. This Regulation, if accepted by Her Majesty's Government would certainly manifest a friendly desire on their part to co-operate with your Government and that of Russia in the protection of their rookeries and in the prevention of any violation of the laws applicable thereto. I have the honour to enclose a draft of a preliminary Convention which I have prepared providing for the appointment of a mixed Commission who are to report on certain specific questions within two years. The draft embodies the temporary Regulations above described together with other clauses which appear to be necessary to give proper effect to them. Although I believe it would be sufficient during the migration periods, to prevent all sealing within a specific distance from the passes of the Aleutian islands I have out of a deference to your views and to the wishes of the Russian Minister adopted

the fishery line described in article V, and which was suggested by you at the outset of our negotiation. The draft, of course, contemplates the conclusion of a further Convention after a full examination of the Report of the mixed Commission. It also makes provision for the ultimate settlement by Arbitration of any differences which the Report of the Commission may still fail to adjust whereby the important element of finality is secured, and in order to give to the proposed arrangement the widest international basis, the draft provides that the other Powers shall be invited to accede to it. The above proposals are, of course, submitted *ad referendum*, and it only now remains for me to commend them to your favourable consideration and to that of the Russian Minister. They have been framed by me in a spirit of justice and conciliation and with the earnest desire to terminate the controversy in a manner honorable to all parties and worthy of the three great nations concerned.

I have, etc.

JULIAN PAUNCEFOTE.

That letter the learned Arbitrators will perceive, brings forward a somewhat new aspect of the matter.

It is designed to lead to a renewal of the negotiations. It proceeds upon the assumption, — it is not an assumption indeed, but upon the expression that the great object of all parties should be the preservation of seals for the benefit of mankind, and that any particular interest of any nation should not be allowed to stand in the way of the accomplishment of that prime end. He then suggests that pending the negotiations, some provisional arrangement should be entered upon for the purpose of proecting in the meanwhile the seals from destructive pursuit. He suggests there, and it is the first time that any suggestion was made to the American Government by the British Government, that there are great differences of opinion as to the facts, and, consequently, great differences of opinion as to the extent of protection which is necessary. Now those differences of opinion as to the facts which I say are thus suggested for the first time, are based in part upon evidence which had been submitted by Sir Julian Pauncefote to Mr Blaine through the instrumentality of quite a series of documents on the 9th of March preceding. I am reading now, because I do not happen to find the letter elsewhere, a letter from Sir Julian Pauncefote to Mr Blaine which is contained in the Executive Documents of the House of Representatives, 51 Congress, 1st session, Executive Document N° 450, and the letter is to be found upon page 26 of that Document, which is as follows :

Washington, March 9th 1890.

Dear Mr Blaine,

I have the pleasure to send you herewith the memorandnm prepared by Mr Tupper on the Seal Fishery Question to which he has appended a note by Dr Dawson, an eminent Canadian Official. Believe me, and so forth.

JULIAN PAUNCEFOTE.

That letter, is very likely somewhere in the correspondence contained in the British Appendices, but I do not happpen to find it.

**Mr Foster.** — It is in the British Appendix, N° 3, page 436, — not the letter, but the memorandum.

**Mr Carter.** — Yes, I know the memorandum is found in the British

Case at the place stated by General Foster; but the memorandum itself and documents themselves thus furnished are all contained in the third volume of the British Case, page 436; and it is necessary also to say U. S. N 2, 1890.

Now, of course, those documents are too long for me to read and it is not important that I should read them; but I can briefly state the general nature of the documents thus submitted to Mr Blaine by Sir Julian Pauncefote. They contained a great deal of evidence designed to make it appear that the destructive nature of pelagic sealing is not so great as it sometimes has been represented to be, and also some matter designed to shew that the destruction of seals is owing to the practice pursued on the Pribilof Islands by the United States' Government in relation to the herd. All that matter, which I assume proceeds from Officials of the Canadian Government, is calculated to shew that no extreme measure of protection is necessary.

Now, this communication of documents to the American Government by Sir Julian Pauncefote on March the 9th, 1890, was, I think I am safe in saying, the first intimation ever received by the Government of the United States that the original measure of prevention suggested by Mr Phelps to the marquis of Salisbury, and accepted provisionally by him was too extreme a measure. Two years had elapsed,— it was more than two years since that proposition had been submitted and thus provisionally accepted by the Marquis of Salisbury; and during all that time, although it was known that the adoption of the measure had been arrested in consequence of the objections of Canada, no different measures had been suggested as coming from Canada and no criticism, on the part of Canada, of the character of that proposed restriction.

On the 9th March however, evidence showing differences of opinion in respect to the effect of Pelagic sealing was placed before the United States Government and presumably it came from Canada. It is to the differences of opinion expressed in these documents that Sir Julian refers when he says.

> The great divergence of views which exists as to whether any restricitons on pelagic sealing are necessary for the preservation of the fur-seal species, and if so as to the character and extent of such restrictions, renders it impossible in my opinion to arrive at any solution that would satisfy public opinion either in Canada or Great Britain or in any country which may be invited to accede to the proposed arrangement without a full enquiry by a mixed Commission of experts the results of whose labours and investigations in the region of the seal fishery would probable dispose of all the points in dispute.

The point, therefore, of Sir Julian is this, we have now arrived at difference of views in reference to matters of fact connected with seal life and with pelagic sealing.

Those differences of views which would exist between us are irreconcileable upon any evidence which is before us. Our object, however, is a common one, the preservation of the fur seal species for the benefit of

mankind and what is needed in order to enable us to come to some arrangement is that we should be thoroughly informed of the facts and in a manner that will allow no room for doubt in respect to them when we ascertain the truth upon those points why then presumably at least we shall find no difficulty in coming to an agreement. We must recognize the truth as it shall finally be discovered and whatever measures of protection the truth thus ascertained shall point out as necessary are the ones to be adopted.

Now the instrumentality which he suggests, and it is the first suggestion of the kind which will accomplish this object of removing all doubts and ascertaining what the real truth about the matter is was a mixed commission of experts; and in saying that they were to be experts of course it was intended that they should be gentlemen perfectly competent to deal with all the questions which arise in connection with the subject, — with the question of natural history as well, in other words, that they should be men of science, should act under the obligations which attach to men of science, should have no object in view except the ascertainment of the truth itself, and that when the report was received from such gentlemen, who had made an investigation under the influence of such motives as that, why its conclusions could be absolutely relied upon by the two Governments as the basis of their action. That is his suggestion. He further says in his note :

> I have the honour to enclose a draft of a preliminary convention which I have prepared for the appointment of a mixed commission who are to report on certain specified questions in your report.

This matter was alluded to in a long debate which was had on the motion to reject the report of the Commissioners of Great Britain. It is important, however, that I should briefly allude to it now. The draft convention he proposed is contained in the same report of volume III of the Appendix to the British case page 457 :

> The high Contracting parties agree to appoint a mixed Commission of experts who shall enquire fully into the subject, and report to the High Contracting Parties within two years from the date of this Convention the result of their investigations, together with their opinions and recommendations on the following questions : — 1. Whether Regulations properly enforced upon the breeding islands (Robin island in the sea of Okhotsk and the Commander Islands and the Pribilof Islands in the Behring's Sea) and in the territorial waters surrounding those islands are sufficient for the preservation of the fur-seal species. — 2. If not, how far from the islands is it necessary that such Regulations should be enforced in order to preserve the species? 3. In either of the above cases, what should such Regulations provide? 4. If a close season is required on the breeding islands and territorial waters, what months should it embrace? 5. If a close season is necessary outside of the breeding islands as well what extent of waters and what period or periods should it embrace? Article II. On receipt of the Report of the Commission, and of any Separate Reports which may be made by individual Commissioners, the High Contracting Parties will proceed forthwith to determine what international Regulations, if any, are necessary for the purpose aforesaid, and any Regulations so agreed upon shall be embodied in a further Convention, to which the accession of the other powers shall be invited. Article III. In case the high Contracting Parties should be unable

to agree upon the Regulations to be adopted, the questions in difference shall be referred to the arbitration of an impartial Government who shall duly consider the Reports hereinbefore mentioned, and whose award shall be final and shall determine the conditions of the further Convention.

In other words, his scheme was to obtain this Report of a mixed Commission of Experts which, in his view, would presumably make it possible for the two Governments to enter into a final Convention upon the subject which would accomplish the desired object; that, if they should not be able to come to an agreement upon receiving the Report, then the points of difference should be referred to the arbitration of an impartial Government. The scheme, therefore, was within two aspects : first, to settle the differences by Treaty; failing that, a reference to arbitration. That is what Sir Julian expresses in one part of his letter : " The draft, of course, contemplates the conclusion of a further Convention after full examination of the Report of the mixed Commission. It also makes provision for the ultimate settlement by arbitration of any differences which the Report of the Commission may still fail to adjust, whereby the important element of finality is secured. " That was the scheme.

Now, there is one further feature of the proposal of Sir Julian upon which I must make an observation; and that is, the measure of *interim* protection, and I read again from his letter; they are : " (1) That pelagic sealing should be prohibited in the Behring Sea, the Sea of Okhotsk, and the adjoining waters, during the months of May and June, and during the months of October, November and December, which may be termed the migration periods' of the fur-seal. " And this, the learned Arbitrators will observe, leaves seals exposed to pelagic slaughter during the months, the important months, of July, August and September, — the most fatal months. " (2) That all sealing vessels should be prohibited from approaching the breeding islands within a radius of 10 miles. "

It is suggesting a protecting zone of that width.

Now, while these negotiations were going on and suggestions by Sir Julian of a renewal of the interrupted negotiations on the basis proposed by him, Lord Salisbury had had under consideration the note of Mr Blaine to Sir Julian which I read at the close of yesterday's session, and which made a full statement of the position of the United States. He had had that under consideration and was preparing an answer to it; and on the 22nd of May, 1890, he sends to Sir Julian his answer, a copy of which was left with Mr Blaine; and that will be found on page 207 of the Appendix to the American Case, from the Marquis of Salisbury to Sir Julian Pauncefote.

Foreign Office, May 22nd, 1890.

Sir : I received in due course your despatch of the 23rd January, inclosing copy of Mr Blaine's note of the 22nd of that month, in answer to the protest made on behalf of Her Majesty's Government on the 12th October last against the seizure of Canadian vessels by the United States revenue cutter *Rush* in Behring Sea. The importance of the subject necessitaded a reference to the Government of Canada,

whose reply has only recently reached Her Majesty's Government. The negociations which have taken place between Mr Blaine and yourself afford strong reason to hope that the difficulties attending this question are in a fair way towards an adjustment—which will be satisfactory to both Governments. I think it right, however, to place on record, as briefly as possible, the views of Her Majesty's Governement on the principal arguments brought forward on behalf of the United States. M. Blaine's note defends the acts complained of by Her Majesty's Government on the following grounds.

1) That the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States! 2) That the fisheries had been in the undisturbed possession and under the exclusive control of Russia from their discovey until the cession of Alaska to the United States in 1867, and that from this date onwards until 1886 they had also remained in the undisturbed possession of the United States Government. 3) That it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to the extinction of the species, and that therefore nations not possessing the territory upon which seals can increase their numbers by natural growth should refrain from the slaughter of them in the open sea. Mr Blaine further argues that the law of the sea and the liberty which it confers do not justify acts which are immoral in themselves, and which inevitably tend to results against the interest and against the welfare of mankind; and he proceeds to justify the forcible resistance of the United States Government by the necessity of defending not only their own traditional and long established rights, but also the rights of good morals and of good Government the world over. He declares that while the United States will not withhold from any nation the privileges which they demanded for themselves when Alaska was part of the Russian Empire, they are not disposed to exercise in the possessions acquired from Russia any less power or authority than they were willing to concede to the Imperial Government of Russia when its sovereignty extended over them. He claims from friendly nations a recognition of the same rights and privileges on the lands and in the waters of Alaska which the same friendly Nations always conceded to the Empire of Russia. With regard to the first of these arguments, namely that the seizure of the Canadian vessels in the Behring Sea was justified by the fact that they were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States, it is obvious that two questions are involved; first, whether the pursuit and killing of fur-seals in certain parts of the open sea is, from the point of view of international morality, an offence *contra bonos mores;* and, secondly, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation. It is an axiom of international maritime law that such action is only admissible in the case of piracy, or in pursuance of a special international agreement. This principle has been universally admitted by jurists, and was very distinctly laid down by President Tyler in his special Message to Congress, dated the 27th February, 1843, when after acknowledging the right to detain and search a vessel on suspicion of piracy, he goes on to say : " With this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever outside the territorial jurisdiction". Now, the pursuit of seals in the open sea, under whatever circumstances, has never hitherto been considered as piracy by any civilised State. Nor even if the United States had gone so far as to make the killing of fur-seals piracy by their Municipal Law, would this have justified them in punishing offences against such Law commited by any persons other than their own citizens outside the territorial jurisdiction of the United States. In the case of the Slave Trade, a pratice which the civilised world has agreed to look upon with abhorrence, the right of arresting the vessels of another country is exercised only by special international agreement, and no one Government has been allowed that general control of morals in this respect which Mr Blaine claims on

behalf of the United States in regard of seal-hunting But Her Majesty's Government must question whether this pursuit can of itself be regarded as *contra bonos mores*, unless and until, for special reasons, it as been agreed by international arrangement to forbid it. Fur-seals are indisputably animal *feræ naturæ*, and these have universally been regarded by Jurists as *res nullius* until they are caught; no person, therefore, can have property in them until he has actually reduced them into possession by capture. It requires something more than a mere declaration that the Government or citizens of the United States, or even other countries interested in the seal trade, are losers by a certain course of proceeding, to render that course an immoral one. Her Majesty's Government would deeply regret that the pursuit of fur-seals on the high seas by British vessels should involve even the slightest injury to the people of the United States. If the case be proved, they will be ready to consider what measures can be properly taken for the remedy of such injury, but they would be unable on that ground to depart from a principle on which free commerce on the high seas depend. The second argument advanced by Mr Blaine is that the fur-seal fisheries of Behring's Sea had been exclusively controlled by the Government of Russia, without interference and without question, from their original discovery until the cession of Alaska, to the United States in 1867, and that from 1867 to 1886 the possession, in which Russia had been undisturbed, was enjoyed by the United States Government also without interruption or intrusion from any source. I will deal with these two periods separately. First, as to the alleged exclusive monopoly of Russia. After Russia, at the instance of the Russian American Fur Company, claimed in 1821 the pursuits of commerce, whaling and fishing from Behring's Straits to the 51° degree of north latitude, and not only prohibited all foreign vessels from landing on the coast and island of the above waters, but also prevented them from approaching within 100 miles thereof, Mr Quincy Adams wrote as follows to the United States Minister in Russia. The United States can admit no part of these claims; their right of navigation and fishing is perfect, and has been in constant exercise from the earliest times throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdiction! That the right of fishing thus asserted included the right of killing fur-bearing animals is shewn by the case of the United States brig "Loriot". That vessels proceeded to the waters over which Russia claimed exclusive jurisdiction for the purpose of hunting the sea otter, the killing of which is now prohibited by the United States Statutes applicable to the fur-seal, and was forced to abandon her voyage and leave the waters in question by an armed vessel of the Russian navy.

Mr Forsyth, writing on the case to the American Minister at St.'Petersburg on the 4th May, 1837, said : " It is a violation of the rights of the citizens of the United States, immemorially exercised and secured to them as well by the law of nations as by the stipulations of the first Article of the Convention of 1824, to fish in those seas, and to resort to the coast for the prosecution of their lawful commerce upon points not already occupied! From the speech of Mr Summer, when introducing the question of the purchase of Alaska, to Congress, it is equelly clear that the United States Government did not regard themselves as purchasing a monopoly. Having dealt with fur-bearing animals, he went on to treat of fisheries, and, after alluding to the presence of different species of whales in the vicinity of the Aleutians, said : " No sea is now *mare clausum*; all of these may be pursued by a ship under any flag, except directly on the coast or within its territorial limit". I now come to the statement that from 1867 to 1886 the possession was enjoyed by the United States with no interruption and no intrusion from any source. Her Majesty's Government cannot but think that Mr Blaine has been misinformed as to the history of the operations in Behring's Sea during that period. The instances recorded in Inclosure 1 in this despatch are sufficient to prove, from official United States sources, that from 1867 to 1886 British vessels were engaged at intervals in the fur-seal fisheries, with the cognizance of the United States Government. I will here, by way of example, quote but one. In 1872, Collector Phelps reported the fitting out of expeditions in Australia and Victoria for the purpose of taking seals in Behring Sea

while passing to and from their rookeries in Saint-Paul and Saint-George Islands, and recommended that a steam-cutter should be sent to the region of Ounimak Pass and the islands of Saint-Paul and Saint-George. Mr Secretary Boutwell informed him, in reply, that he did not consider it expedient to send a cutter to interfere with the operations of foreigners, and stated. "In addition, I do not see that the United States would have the jurisdiction or power to drive off parties going up there fore that purpose, unless they made such attempt within a marine league of the shore." Before leaving this part of Mr Blaine's argument, I would allude to his remark, that vessels from other nations passing from time to time through Behring Sea to the Artic Ocean in pursuit of whales have always abstained from taking part in the capture of seals, which he holds to be proof of the recognition of rights held and exercised first by Russia and then by the United States.

Even if the facts are as stated, it is not remarkable that vessels pushing on for the short season in which whales can be captured in the Arctic Ocean, and being fitted specially for the whale fisheries, neglected to carry boats and hunters for fur-seals, or to engage in an entirely different pursuit. The whalers, moreover, pass through Behring Sea to the fishing-grounds in the Arctic Ocean in April and May as soon as the ice breaks up, while the great bulk of the seals do not reach the Pribylov Islands till June, leaving again by the time the closing up of the ice compels the whalers to return. The statement that it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to their extinction would admit of reply, and abundant evidence could be adduced on the other side. But as it is proposed that this part of the question should be examined by a Commitee to be appointed by the two Governments, it is not necessary that I should deal with it here. Her Majesty's Government do not deny that if all sealing were stopped in Behring Sea except on the islands in possession of the lessees of the United States, the seal may increase and multiply at an even more extraordinary rate than at present, and the seal fishery on the islands may become a monopoly of increasing value; but they cannot admit that this is a sufficient ground to justify the United States in forcibly depriving other nations of any share in this industry in waters which by the recognized law of nations, are now free to all the world. It is from no disrespect that I refrain from replying specifically to the subsidiary questions and arguments put forward by Mr Blaine. Till the views of the two Governments as to the obligations attaching, on grounds either of morality or necessity, to the United States Government in this matter, have been brought into closer harmony, such a course would appear needlessly to extend a controversy which Her Majesty's Government are anxious to keep within reasonable limits.

The negotiations now being carried on at Washington prove the readiness of Her Majesty's Government to consider whether any special international agreements is necessary for the protection of the fur-sealing industry. In its absence they are unable to admit that the case put forward on behalf of the United States affords any sufficient justification for the forcible action already taken by them against peaceable subjects of Her Majesty engaded in lawful operations on the high seas. "The President", says Mr Blaine, "is persuaded that all friendly nations will concede to the United States the same rights and privileges on the lands and in the waters of Alaska which the same friendly nations always conceded to the Empire of Russia! Her Majesty's Government have no difficulty in making such a concession. In strict accord with the views which, previous to the present controversy, were consistently and successfully maintained by the United States, they have, whenever occasion arose, opposed all claims to exclusive privileges in the non territorial waters of Behring Sea. The rights they have demanded have been those of free navigation and fishing in waters which, previous to their own acquisition of Alaska, the United States declared to be free and open to all foreign vessels. That is the extent of their present contention, and they trust that, on consideration of the arguments now presented to them, the United States will recognise its justice, and moderation. I have to request that you will read this despatch to Mr Blaine, and have a copy of it with him should he desire it.

I am, etc. SALISBURY.

There is the answer, and the only answer, contained in this diplomatic correspondence, to the full statement of the grounds of right upon which the case of the United States was put in the note of Mr Blaine; and although I am not going into the discussion now of the merits, it is proper for me to call the attention of the learned Arbitrators to the manner in which the positions were met. Lord Salisbury, states, and fairly enough, very briefly, the grounds upon which Mr Blaine places his contention. The first was that " the Canadian Vessels arrested and detained in the Behring Sea were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States ". " Mr Blaine further argues that the law of the sea and the liberty which it confers do not justify acts which are immoral in themselves, and which inevitably tend to results against the interests and against the welfare of mankind; and he proceeds to justify the forcible resistance of the United States Government by the necessity of defending not only their own traditional and long-established rights, but also the rights of good morals and of good government the world over ".

There is, perhaps, a touch of irony in this observation of Lord Salisbury imputing to the United States the assumption of a jurisdiction for the protection of good government and good morals, the world over. That imputation was hardly justified by anything which Mr Blaine had said — he did not put forward any assumption of that character. His ground was that the pursuit of pelagic fishing was *contra bonos mores* — in other words it was an essential, and upon fundamental principles, an indefensible wrong, that, of itself, did not give the Government of the United States the right to interfere. Mr Blaine made no such pretention: but when it was at the same time injurious to a most valuable and lawful interest of the United States, that circumstance gave, as he insisted, an authority to the Government of the United States to interfere and prevent the doing of an injury to its own interests by acts which were, in themselves, indefensible wrongs.

Lord Salisbury further considering this ground put forward by Mr Blaine, that pelagic sealing was an offence *contra bonos mores*, says that two questions are involved in it, first whether the pursuit and killing of seals in certain parts of the open sea is, from the point of view of international morality, an offence *contra bonos mores?* That is extremely well stated and, secondly : whether, if such be the case, this is a fact to justify the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation; and nothing can be better stated than that. The position taken by Mr Blaine did raise those two questions; it did raise them, exactly, whether from the point of view of international morality, pelagic sealing is right or wrong; and, secondly, whether, if from the point of view of international morality it be declared to be wrong, that circumstance furnishes to the United States a ground upon which it can, in time of peace, arrest, and carry in for condemnation,

a vessel engaged in the practice. It does raise, precisely, those two questions.

Now Lord Salisbury proceeds, and what is his argument in respect of it? Why, first it is this : Suppose it to be *contra bonos mores*; suppose it to be against international morality; suppose it to be indefensible wrong, that does not give United States any right to arrest a vessel engaged in the practice. Why? — Because it is in time of peace.

That is to say, the proposition of Lord Salisbury is that in time of peace, no matter what injury or indefensible act of wrong the citizens of a foreign power may inflict on the United States Government or its citizens, no vessel engaged in the infliction of that wrong can be arrested and detained when she is upon the high seas. Now, I am not going to assume that, but he does cite here — (he is able to make a pretty happy use of the argument *ad hominem*) and from President Tyler a pretty square recognition of that very principle. President Tyler, in a special Message to Congress, in reference, as I assume from the date, to the negotiations concerning the suppression of the Slave Trade — (I am now reading from page 208 of the Appendix) — says : — " With this single exception — for a piracy " — no nation has in time of peace any authority to detain the ships of another upon the high seas upon any pretext whatever outside the territorial jurisdiction. Well, President Tyler was an American in a high official position, but his authority is not binding here unless it expresses the truth; and this position by him, we shall argue at another stage in the debate, is wholly without authority; and Lord Salisbury must at the time have failed to bear in mind, the circumstance that there had been, for a century, on the Statute books of his own nation, laws against hovering — laws in relation to quarantine, prescribing rules and regulations purporting to bind foreign vessels as well as native vessels, and for a violation of which, anywhere upon the high seas, according to the British Statute, any such violation would be followed by arrest and condemnation, and many other instances we shall have hereafter to note in the argument.

It is a very brief suggestion in answer to Mr Blaine, and does not seem to be very satisfactory. I may further add upon the merits of this case, the ground is, that even if pelagic sealing were *contra bonos mores*, it is not piracy — it does not amount to piracy. Why if it did, every Government might suppress it, and suppress it upon the high seas; but because it does not amount to piracy, they cannot. Why can any Government upon the high seas suppress piracy? Why because it is wrong; because it is an indefensible wrong, and a wrong against all nations; and so great a wrong that by tacit agreement, every power is permitted to take measures to suppress it. I cannot myself perceive the force of the argument which is drawn upon a supposed distinction between wrongs. If wrongs against all nations may be suppressed by all nations, one wrong may be suppressed as well as another particularly, and not in general, at least, when the commission of the wrong happens to work a special injury against the interests of a particular State.

Lord Salisbury, then in coming to the other branch of the argument of Mr Blaine, as he states it, namely, that it is *contra bonos mores*, is very brief, and it amounts to this : No, it is not *contra bonos mores*, because the nations never agreed that it was *contra bonos mores*. They have agreed that piracy was such; they have agreed in part that the Slave Trade was such; but they never have agreed that pelagic sealing was *contra bonos mores*. Is it true that whether a thing is right or wrong, whether a thing is *contra bonos mores*, or not, depends upon the circumstances whether nations have come together and agreed so? I had supposed that the distinctions between right and wrong were deeper by far than that; and I suppose, too, that neither piracy nor the Slave Trade would ever have been by agreement between nations regarded as wrong instead of right, unless by their essential nature before the Agreement was reached, they were so.

Now in that exceedingly brief manner, Lord Salisbury disposes of the long contention of Mr Blaine which condemned pelagic sealing on the ground that it was *contra bonos mores*, because it was destructive of a race of animals useful and beneficial to the United States, and useful and beneficial to mankind. I cannot help thinking that Lord Salisbury rather avoided than answered the argument. He could not have answered the argument without dealing with the nature of that practice and that pursuit; its real essential nature, enquiring whether it was in fact actually destructive of a useful race of animals, and if so, whether it could in any form be defended.

I cannot anticipate, the argument which I shall have hereafter to make, to this Tribunal, but I cannot help thinking that that position was rather evaded, than answered, by Lord Salisbury. He much prefers to put his contention and to display his power in dealing with the ground of the reliance upon the pretensions of Russia, and therefore he comes to deal with that part of the argument of Mr Blaine, and he says : — The second argument advanced by Mr Blaine is that the fur seal fisheries of Behring Sea had been exclusively controlled by the Government of Russia, without interference and without question, from their original discovery until the cession of Alaska to the United States in 1867' ; " and that from 1867 to 1886 the possession in which Russia had been undisturbed, was enjoyed by the United States' Government also without interruption or intrusion from any source ". The learned Arbitrators will perceive thast the contention by Mr Blaine, as thus stated did not rest upon any assertion that Russia had an original right to an exclusive enjoyment of the fur seal fishery in Behring Sea. It was not an assertion of that kind — it was an assertion that, in point of fact, she had enjoyed that right without interruption and without interference by other Governments during the whole period of her occupation, and that the United States since they had acquired the territory of Alaska from Russia had enjoyed, as a matter of fact without interruption from other nations, the exclusive right of seal fishery in Behring Sea. Lord Salisbury's answer does not meet that

aspect of the question at all. His answer to it is this. It says that when in 1821, Russia by the celebrated Ukase of that year attempted to assert a sovereign jurisdiction over the Behring Sea, and to exclude the visits of other nations from an area of 100 miles around all the coasts, that foreign Governments did not assent to it, but protested against it; and that among others the United States protested against it; and he cites the language of Mr John Quincy Adams, (who was then the American Secretary of State) protesting against these pretensions of Russia. It will be remembered that Lord Salisbury had, at an early stage of the controversy, alluded to this same matter, and endeavoured to maintain that the United States Government had no authority to do the acts they had done in Behring Sea, and that they had by their own action shown that they had no such authority, because they had protested against similar pretensions when they had been made by Russia. But I must again remark that the argument of Mr Blaine did not put forward the valuable pretensions of government, but it put forward the matter of fact of the exclusive possession of these fisheries by Russia and by the United States, and it was no answer to the argument to say that the Governments of several countries had, while acquiescing in this exclusive possession, in fact had, in language, denied the validity of pretensions which had been made.

Lord Salisbury at the conclusion of his Note further observes :

> Her Majesty's Government do not deny that if all sealing were stopped in Behring Sea except on the islands in possession of the lessees of the United States, the seal may increase and multiply at an even more extraordinary rate than at present and the seal fishery on the islands may become a monopoly of increasing value; but they cannot admit that this is sufficient ground to justify the United States in forcibly depriving other nations of any share in this industry in waters which, by the recognized law of nations, are now free to all the world.

Well, that is another implied assertion that where the waters of the sea are free to the world — that is on the high seas, any where — all nations are free to do as they please; a proposition which seems to me to stand refuted on its mere assertion, but with which I shall have here-after to deal more particularly. What I have now said describes the position taken by Great Britain in answer to the Note of Mr Blaine which fully set forth upon its merits the attitude of the United States in reference to pelagic sealing; and my general observation is, that while the Note is drawn up with ingenuity and ability, it rather avoids, than answers, the arguments to which it was addressed.

In the course of this correspondence Mr Blaine already had before him the proposition of Sir Julian Pauncefote for a mixed Commission which also carried with it a proposal for an interim period of protection: protecting seals during the months of May, and June, and October, November and December.

**Senator Morgan.** — Mr Carter, are you referring now to the draft convention which you have just been reading from?

**Mr Carter.** — That is what I refer to : the draft convention. He still had that before him and had not answered it. While he had it before him he receives further protest from Sir Julian Pauncefote in reference to seizures. It is found on page 212 of our Appendix :

*Sir Julian Pauncefote to Mr Blaine.*

Washington, May 23, 1890.

SIR : I have the honor to inform you that a statement having appeared in the newspapers to the effect that the United States revenue cruisers have received orders to proceed to Behring Sea for the purpose of preventing the exercise of the seal bishery by foreign vessels in nonterritorial waters, and that statement having been confirmed yesterday by you, I am instructed by the Marquis of Salisbury to state to you that a formal protest by Her Majesty's Government against any such interference with British vessels will be forwarded to you without delay.

I have, etc.,

JULIAN PAUNCEFOTE.

Now, then the situation which confronted Mr Blaine was this : President Harrisson had felt obliged to take methods of suppressing pelagic sealing in the Behring Sea, the negotiations having failed. Those measures for its suppression caused seizures and the seizures caused protests. There were suggestions contained in the correspondence which I have read of renewed efforts for an accommodation : but nothing precise had been determined upon. The only proposition which was up for consideration was that which accompanied the note of Sir Julian Pauncefote to Mr. Blaine which I have just stated.

The question was what should be done with that. The situation before Mr Blaine was this : two years and more than two years had elapsed since the negotiations were originally entered upon and which at first promised to be so speedily successful. The failure of that negotiation was a disappointment, a great disappointment to the Government of the United States. They had felt obliged to proceed with the enforcement of measures designed to suppress pelagic sealing : and now another proposition for negotiation came in with another measure of interim protection. And what was that? I presume Mr Blaine naturally expected that any measure of interim protection would be as broad and effective as the one which had been originally proposed to the British Government for final and permanent protection. He had expected that; but now he had this proposition from Sir Julian Pauncefote; and what was it? To appoint a mixed commission of experts who were to report at the expiration of a period of two years. Upon their report being made to the two Governments an effort was to be made to come to an agreement upon it through the means of a convention which would take no one knows how long. The correspondence which had already occurred had stretched through years. If the effort to come to an agreement by convention had failed the suggestion was the reference to the arbitration of some impartial Government. And how long that would take, of course, nobody could say.

At all events the proposition carried with it the probability that measures designed to settle the controversy and the dispute and to preserve the fur-seals from extermination would be in progress of adjustment for a period of at least five to ten years : and in the meantime the only suggestion for the interim protection of the fur-seals was a protection of them during the months of May and June, October, November and December, leaving them exposed to capture and extermination during the most important months of June, July and August.

Well, in his view — it seems to me a not unreasonable one — this proposition carried with it a certainty almost that the whole race would be exterminated before the end of the negotiation was reached; and when Mr Blaine came to answer that he answered it with some measure of impatience and irritation. That answer is contained in his letter of May 29, 1890, which is found on page 212. It is too long to read and it is not sufficiently important to be read, but I must summarize the contents as well as I may.

It contains the recital of the various steps which up to that time had taken place in the effort to bring the two countries to an agreement. Then on page 215 it deals with the proposition of Sir Julian :

> Your proposition is that pelagic sealing should be prohibited in the Behring Sea during the months of May, June, October, November, and December, and that there should be no prohibition during the months of July, August, and September. Your proposition involved the condition that British vessels should be allowed to kill seals within 10 miles of the coast of the Pribilof Islands. Lord Salisbury's proposition of 1888 was that during the same months, for which the 10 mile privilege is now demanded, no British vessel hunting seals should come nearer to the Pribilof Islands than the 47th parallel of north latitude, about 600 miles.
>
> The open season which you thus select for killing is the one when the areas around the breeding islands are most crowded with seals, and especially crowded with female seals going forth to secure food for the hundreds of thousands of their young of which they have recently been delivered. The destruction of the females which, according to expert testimony would be 95 per cent of all which the sealing vessels might readily capture, would inflict deadly loss upon the rookeries. The destruction of the females would be followed by the destruction of their young on the islands, and the herds would be diminished the next year by this wholesale slaughter of the producing females and their offspring.
>
> The ten-mile limit would give the marauders the vantage ground for killing the seals that are in the water by tens of thousands searching for food. The opportunity, under cover of fog and night, for stealing silently upon the islands and slaughtering the seals within a mile or even less of the keeper's residence would largely increase the aggregate destruction. Under such conditions the British vessels could evenly divide with the United States, within the three-mile limit of its own shores and upon the islands themselves, the whole advantage of the seal fisheries. The respect which the sealing vessels would pay to the ten-mile limit would be the same that wolves pay to a flock of sheep so placed that no shepherd can guard them. This arrangement according to your proposal, was to continue for three months of each year, the best months in the season for depredations upon the seal herd. No course was left to the United States or to Russia but to reject the proposition.
>
> The propositions made by Lord Salisbury in 1888 and the propositions made by Her Majesty's Minister in Washington in 1890 are in significant contrast. The circumstances are the same, the conditions are the same, the rights of the United

States are the same in both years. The position of England has changed, because the wishes of Canada have demanded the change. The result then with which the United States is expected to be content is that her rights within the Behring Sea and on the islands thereof are not absolute, but are to be determined by one of Her Majesty's provinces.

That was the manner in which this proposition was received by Mr Blaine with some considerable degree of impatience, as will be observed. He seemed to feel that every moment he was confronted with the objection of Canada and that the objection of Canada was in all instances perfectly effective to prevent the approach to any accommodation.

For my own part I see no objection whatever — I think I may say with every propriety — why Great Britain before she should come to an arrangement of this sort should consult Canada; because Canada was the province which was more immediately interested, I see no reason for complaint upon that score. It is a little different, however, when we come to consider the circumstance that originally, when the proposition made by Mr Phelps was provisionally accepted by Lord Salisbury, it was not stated that it would be dependent upon the wishes of Canada, or dependent upon the result of investigations made after Canada had been consulted. Had that been stated at that time it would have prevented the raising of expectations only to be disappointed.

These observations, of course, do not relate to the merits. They are designed to explain the progress of the negotiations and the sentiments of the negotiators from time to time; but at this point of time it is very observable that there was on the part of Mr Blaine a feeling of a great deal of impatience, as if he had been in some manner wronged.

**Senator Morgan**. — Mr Carter, what is the date of that letter, if you please, that you are reading from Mr Blaine?

**Mr Carter**. — May 29, 1890.

**Senator Morgan**. — If it would not disturb you I would like to call your attention on page 461 of Vol. 3 of the Appendix to the British Case to a note from the Marquis of Salisbury to Sir Julian Pauncefote. Its number is 332.

**Mr Carter**. — I have it.

**Senator Morgan**. — It is very short, and for the purpose of calling your attention to the particular language of it I will read it :

> Sir : I have received your dispatch of the 29th ultimo covering copy of a note in which you submit to Mr Blaine the draft convention which has been approved by the Government of Canada for the settlement of the Behring's Sea fisheries question, as well as a copy of the draft convention itself.
>
> The terms of your note are approved by Her Majesty's Government.

The point as it seems to be there is that there is a wide distinction between the grounds taken by Sir Julian Pauncefote in his note in which he represents the British Government and which is approved, and the terms of the draft convention.

**Mr Carter**. — Is it the suggestion of the learned arbitrator that the

terms of the draft convention proposed by Sir Julian Pauncefote had received the approval of Her Majesty's Government?

**Senator Morgan.** — No, sir : it had received the approval of the Canadian Government, as was expressed to Lord Salisbury; but the terms of the note from Sir Julian Pauncefote to the United States Government had been approved by the British Government.

**Sir John Thompson.** — That note referred to there was the note of Sir Julian Pauncefote laying it before Mr Blaine.

**Senator Morgan.** — Yes; I refer to the discrepancy between that note and the draft convention.

**Sir Charles Russell.** — There is no discrepancy.

**Senator Morgan.** — We differ about that.

**Mr Carter.** — I had assumed that the note from Sir Julian Pauncefote to Mr Blaine containing the draft convention proposed by him was agreeable to the Government of Canada and that because it was agreeable to the Government of Canada it was approved by the Government of Her Majesty.

**Sir Charles Russell.** — May I point out, with the permission of my friend, that this is a matter on which my learned friend and I will not differ. The Government of Canada is necessarity controlled by the Imperial Government of Her Majesty. The Government of Canada approved of the convention, but the Government of Her Imperial Majesty is the only Government which diplomatically could discuss or determine the matter with the United States Government.

**Senator Morgan.** — I comprehend that.

**Sir Charles Russell.** — And indeed it was necessary to convey, and only necessary to convey, the fact that the Imperial Government had approved it.

**Senator Morgan.** — I certainly comprehend that; but if in this cautious note of Lord Salisbury he says the Government of Canada has approved of a draft convention and the Government of Her Majesty has approved your note to Mr Blaine, and then if there is a material and wide discrepancy between the propositions and the between arguments and the statements in Sir Julian Pauncefote's note and those found in the draft convention, I suppose that it was intended that while the note of Sir Julian with its doctrines and statements was approved by the Government of Her Majesty the draft convention had been approved and consented to only by Canada. Of course that was enough for the British Government.

**Mr Carter.** — There may be more in this than I have perceived : but I have understood the note of Lord Salisbury to Sir Julian Pauncefote as designed to approve of his conduct in transmitting that note to the Government of the United States.

**Sir Charles Russell.** — Quite so.

**Mr Carter.** — And in thus approving of his conduct in transmitting in the way he did that draft convention to the Government of the United States, it amounts to an approval of the convention itself.

**Senator Morgan.** — But it is an approval based on the consent of Canada.

**Mr Carter.** — That is undoubtedly one of the reasons — perhaps the only reason for what I know : but it was an approval which had been moved, which was based upon, if you please, the approval of the Government of Canada. I suppose it is quite manifest all along here that the approval of the Government of Great Britain to any measures of restriction upon pelagic sealing were dependent upon the wishes of the Government of Canada. That is the fact which made Mr Blaine somewhat impatient. (I do not argue now whether he was properly or improperly impatient,) but it was the fact.

**The President.** — We have only before us in this matter the British Government. We are not to enter into a consideration of the motives on which the British Government decided the course they would adopt. Whether the Canadian Government has an influence upon the decisions of the Imperial Government is a matter of interior consideration by the British Government itself; but we have here as a party only the British Government.

**Mr Carter.** — That is quite true. I am not giving any material consequence to the consideration whether the Government of Great Britain awaited the action of the Government of Canada, or made its own action dependent upon the Government of Canada except in this point of view, so far as it explains the temper, the disposition of the corresponding diplomats and the grounds and reasons why one may have thought that one had a complaint against the other for delay. It is pertinent in that point of view, and in that point of view alone as I conceive.

**Senator Morgan.** — I beg leave to say this in defence of my position : Mr Carter read with great emphasis this clause from the letter of Sir Julian to Mr Blaine on page 455 :

> It has been admitted from the commencement that the sole object of the negotiation is the preservation of the fur-seal species for the benefit of mankind, and that no considerations of advantage to any particular nation or of benefit to any private interest should enter into the question.

And then the learned counsel was proceeding to argue that under the terms of this convention the fur-seals in Behring Sea resorting to the Pribilof Islands were exposed during the most dangerous period of the year to them to extermination by the Canadian sealers. He, I understood, inferred that Her Majesty's Government had changed its grounds upon the question of the duty of both Governments to preserve the seal herds from extermination.

**Mr Carter.** — I beg pardon; I did not intend to so argue. I see no evidence here that the Government of Great Britain at any time changed its avowed ground, at least that the prime object of these negotiations was to preserve the fur-seal from extinction. That ground as avowed by them at first continued to be avowed until the last. Whether the measures which they actually suggested or the measures which they were willing to accede

to were such as we might expect from a Government which took that ground, and made that avowal, whether they were sufficient for the object or not, is a matter about which different opinions may be entertained; but that they ever changed their ground in reference to the necessity of protecting the fur-seal I do not think. It is very far from any intention of mine to make any such assertion. I make the contrary assertion, in reference to the avowed ground of the British Government.

Mr Blaine after this letter from which I have read extracts, of May 29th, addresses another letter to Sir Julian Pauncefote before he had received a reply, which was this :

*Mr Blaine to Sir Julian Pauncefote.*

Department of State, Washington, June 2, 1890.

My Dear Sir Julian : I have had a prolonged interview with the President on the matters upon which we are endeavoring to come to an agreement touching the fur-seal question. The President expresses the opinion that an arbitration cannot be concluded in time for this season. Arbitration is of little value unless conducted with the most careful deliberation. What the President most anxiously desires to know is whether Lord Salisbury, in order to promote a friendly solution of the question, will, make for a single season the regulation which in 1888 he offered to make permanent. The President regards that as the step which will lead most certainly and most promptly to a friendly agreement between the two Governments.

I am, etc.,

James G. Blaine.

The two Governments now appear to have come to a decided difference upon the measures which they were prepared to assent to providing for an interim preservation of the seal. We have a communication here from Sir Julian that Lord Salisbury thinks that the measure proposed in 1888 and provisionally accepted by him was too extreme a measure. He is not prepared to assent to it and suggests a further difficulty, namely that in the absence of legislation by parliament the Government would not be enabled to enforce it upon British vessels.

In answer to this suggestion of an inability to execute such a restrictive provision without an act of parliament, I will say without reading the correspondence that Mr Blaine suggested that the United States Government would be satisfied if without an act of parliament the Government of Great Britain would issue a proclamation forbidding pelagic sealing or requesting vessels to abstain from it they would be satisfied with that. That proposal was answered by Sir Julian on the 27 th of June. I read from page 223 of the first volume of the American Appendix :

*Sir Julian Pauncefote to Mr Blaine.*

Washington, June 27, 1890.

Sir : I did not fail to transmit to the Marquis of Salisbury a copy of your note of the 11th instant, in which, with reference to his lordship's statement that British

legislation would be necessary to enable Her Majesty's Government to exclude British vessels from any portion of the high seas " even for an hour, " you informed me, by desire of the President, that the United States Government would be satisfied " if Lord Salisbury would by public proclamation simply request that vessels sailing under the British flag should abstain from entering the Behring Sea during the present season. "

I have now the honor to inform you that I have been instructed by Lord Salisbury to state to you in reply that the President's request presents constitutional difficulties which would preclude Her Majesty's Government from acceding to it, except as part of a general scheme for the settlement of the Behring Sea controversy, and on certain conditions which would justify the assumption by Her Majesty's Government of the grave responsibility involved in the proposal.

Those conditions are :

I. That the two Governments agree forthwith to refer to arbitration the question of the legality of the action of the United States Government in seizing or otherwise interfering with British vessels engaged in the Behring Sea, outside of territorial waters, during the years 1886, 1887, and 1889.

II. That, pending the award, all interference with British sealing vessels shall absolutely cease.

III. That the United States Government, if the award should be adverse to them on the question of legal right, will compensate British subjects for the losses which they may sustain by reason of their compliance with the British proclamation.

Such are the three conditions on which it is indispensable, in the view of Her Majesty's Government, that the issue of the proposed proclamation should be based.

As regards the compensation claimed by Her Majesty's Government for the losses and injuries sustained by British subjects by reason of the action of the United States Government against British sealing vessels in the Behring Sea during the years 1886, 1887 and 1889, I have already informed Lord Salisbury of your assurance that the United States Government would not let that claim stand in the way of an amicable adjustment of the controversy, and I trust that the reply which, by direction of Lord Salisbury, I have now the honor to return to the President's inquiry, may facilitate the attainment of that object for which we have so long and so earnestly labored.

I have, etc.,

JULIAN PAUNCEFOTE.

**The President.** — If you have come to the end of a branch of this subject I think it would be well to interrupt here.

[The Tribunal there upon took a recess for a short while.]

**Mr Carter.** — I had just read Sir Julian Pauncefote's note to Mr Blaine in which he conveys the terms under which Lord Salisbury was prepared to accede to Mr Blaine's request that the British Government would by proclamation request an abstention from pelagic sealing in Behring Sea during the then coming season or the present season. The Arbitrators will observe that Lord Salisbury stated that there were grave constitutional difficulties in the way of taking the course suggested, and that the British Government could not adopt such a course as that unless there were very plain justification for it, that it created a responsibility which the Government was not prepared to assume without there was very grave occasion for it, but intimated that if three conditions were complied with, they would notwithstanding make that request. Those conditions were, that the two Governments should forthwith agree to submit to arbitration

the question of the legality of the United States Government in making seizures, that pending the award all interference with British sealing vessels by the United States should cease, and third that the United States Government if the award should be adverse to them on the question of legal right would compensate British subjects for their loss.

Well, the learned Arbitrators will observe — of course, they cannot fail to observe — throughout this correspondence the play of diplomatic skill and ability on the part of one side in dealing with the other; and it is observable in these views of Lord Salisbury, I think. He found that the Government of the United States were extremely anxious to prevent pelagic sealing in Behring Sea during the coming season; that unable to get anything better they would content themselves with a request from the British Government by proclamation that such sealing should not be engaged in. Finding that they were so anxiouns upon that score he thought that by acceding to their views in that particular he might gain certain other advantages; first, absolute non-interference with British sealing vessels during the pendency of negotiations; and, secondly, a reference to arbitration which should include not only a determination on the question of right, but also a determination upon questions of alleged damages sustained by British vessels. The Arbitrators will here perceive the first direct suggestion of the scheme of an arbitration upon the question of right. That is the principle feature of this letter. It is true that an arbitration had been at an anterior period suggested by Sir Julian Pauncefote, but it was to be the arbitration of a friendly Government, in case the two Governments should not find themselves able to agree on the question of Regulations after they had received the report of the proposed mixed Commission of experts. But the arbitration thus suggested by Sir Julian Pauncefote was, you will perceive, only on the question of Regulations. The arbitration here suggested by Lord Salisbury is one upon the question of legal right, and also upon the question of damages. We find here, therefore, the first germ of that final submission of the matters in dispute to arbitration, which was made by the Treaty under which these proceedings are had.

I may at once refer, though it is not in the order I have adopted, to the answer of Mr Blaine to this proposal. It is found in his letter of July 2nd 1890, on page 239.

Sir your note of the 27th ultimo, covering Lord Salisbury's reply to the friendly suggestion of the President was duly received. It was the design of the President, if Lord Salisbury had been favorably inclined to his proposition, to submit a form of settlement for the consideration of Her Majesty's Government, which the President believed would end all dispute touching privileges in Behring Sea. But Lord Salisbury refused to accept the proposal unless the President should *forthwith* accept a formal arbitration which his lordship prescribes. The President's request was made in the hope that it might lead to a friendly basis of agreement, and he cannot think that Lord Salisbury's proposition is responsive to his suggestion. Besides the answer comes so late that it would be impossible now to proceed this season with the negotiation the President had desired. An agreement to arbitrate requires careful consideration. The United States is, perhaps, more fully commit-

ted to that form of international adjustment than any other power, but it cannot consent that the form in which arbitration shall be undertaken shall be decided without full consultation and conference between the two Governments. I beg further to say that you must have misapprehended what I said touching British claims for injuries and losses alleged to have been inflicted upon British vessels in Behring Sea by agents of the United States. My declaration was that arbitration would logically and necessarity include that point.

It is not to be conceded, but decided with other issues of far greater weight. I have the honuor to be, etc.

JAMES G. BLAINE.

The learned Arbitrators will remember the letter which I read sometime ago, before the recess, from Mr Blaine to Sir Julian Pauncefote, written, perhaps, under some measure of irritation at what be supposed to be the unreasonable delays of Great Britain, and the shifting of ground by her, in respect to interim measures of protection.

To that letter the Marquis of Salisbury writes an answer or he writes a note designed to be an answer to it, which is on the 20th of June, 1890.

Now as it does not raise a material point in the discussion I will not read it, unless my learned friends on the other side should deem it essential, but attempt a summary of it.

It is to be found on page 236 of the American Case. The points that be endeavors to make in it are substantially these : First that the agreement which was originally made between him and Mr Phelps, in reference to a close season, was a provisional agreement only, not designed to be final; and the intimation is that the United States was hardly justified in conceiving it to be final. He then says it was dependent on the views which Canada might entertain of it, although he does not state that he at the time stated to Mr Phelps or otherwise, in such manner that it would reach the American Government, that it was conditional upon any acceptance of it by Canada, and he savs that if the United States were not at first apprised of this, why, they were at a subsequent period, which indeed is true, though it was not until after a considerable delay.

In the next place he says the delay, that of two years, which has been occasioned was not solely in consequence of the objections of Canada, but that it was made necessary in consequence of a divergence of views between the two governments in respect of the necessity of a measure so stringent as that for the preservation of the fur-seals; and that owing to the remoteness of the region from which information was obtainable, a long period of time had necessarily elapsed in the effort to gain information upon which the government could intelligently act. He intimates besides that some of the delay, at least, was chargeable not upon the British Government, but upon potitical emergencies in the United States, meaning, I suppose, the change of administration from that of President Cleveland to that of President Harrison. That is I believe, a fair statement of the points sought to be made by Lord Salisbury in this note.

Now the next feature in this stage of the controversy to which I call

the attention of the Tribunal is the letter of Mr Blaine to Sir Julian Pauncefote of June 30th 1890 and which is found on page 224 of the American Appendix. This letter of Mr Blaine is important in as much as it takes up the argument upon the questions in dispute as that argument was left by Lord Salisbury replying to Mr Blaine's letter in which he fully set forth the position of the United States. The Arbitrators will remember that I read Lord Salisbury reply and I briefly commented upon it pointing out what appeared upon the face of it, that it was rather an attempt to pass over the ground of Mr Blaine and go really upon the attitude taken by the United States in 1822 protesting against the pretentions of Russia to an exceptional marine jurisdiction in Behring Sea. The disposition of Lord Salisbury I remarked seemed to me to be to draw away the discussion from the substantial grounds taken by Mr Blaine, that of inherent or essential right, and to engage him in a discussion in reference to the validity of Russian pretensions in Behring Sea. Well if it were permitted, and if it were worth while to criticise the conduct of Mr Blaine as a controversialist or negotiator I should say that he committed an unwise step in respect to the suggestion of Lord Salisbury in allowing himself to be drawn away from the impregnable attitude upon which he stood, impregnable as it seems to me and which Lord Salisbury had undertaken as I think to avoid and pass over to that region of controversy to which Lord Salisbury had invited him. That was an imprudent step as it seems to me. The wiser course would have been to say to Lord Salisbury I do not think you have answered the positions which I took, and the positions which I have taken are the main grounds upon which the United States base its contention, and I shall expect a further and more satisfactory answer to them if it can be made. But he did accept the invitation of Lord Salisbury and he took up this question of Russian exercise of authority in Behring Sea. He wrote a long letter in relation to it.

Now that letter again is too long to be read and not of sufficient importance to be read. The only importance that it has in the aspect of the controversy that I am now presenting to the Tribunal is that it exhibits a stage in the discussion of this question of Russian pretensions in doing so. It is the answer on the part of the United States Government and the best answer that the United States Government ever made to the argument of Great Britain that Russia had originally made pretensions similar to those then made by the United States that these pretensions when made by Russia in 1821 were resisted by the United States Government upon the same ground that Great Britain was now resisting the pretensions of the United States. That was the argument of Lord Salisbury, and Mr Blaine makes an answer to it here. Now I must attempt to summarise that answer of Mr Blaine and to present without reading the letter which is exceedingly long, and which I assume of course that the Arbitrators themselves will carefully do — I must endeavour to present a summary of it. It is this. Mr Blaine's argument is that long prior to the year 1821 Russia had by prior discovery and prior occupation gained an

absolute title to all the territories sorrounding Behring Sea — that upon the Siberian coast she had no rival whatever and had complete possession of the whole territory from Behring Straits down to the 47th parallel of latitude or in that vicinity. She had pushed her discoveries on the American coast of Behring Sea also, and had a recognized title to all the territory from Behring Straits down to the 54° of latitude at least and that besides that she had discovered and asserted her title to the whole chain of the Aleutian Islands. That all that was long prior to the year 1821 indeed prior to 1800. In the year 1821 she issued her celebrated Ukase the principal point of which was that she asserted a right to all the products of this whole region — to all the trade of the whole region, and for the purpose of protecting that product and that trade a right to exclude the vessels of all nations from the shores and islands — from a belt 100 miles from the shore all along the islands and coasts of the sea. That was her assumption by the Ukase.

The Governments of Great Britain and the United States objected to those claims; but that the principal ground of their objection was not to any assumption of authority over the sea nor to any assumption of authority over the shores of Behring Sea, as to which the whole world admitted that the title of Russia was exclusive, but the principal ground of complaint on the part of Great Britain and the United States was, according to Mr Blaine's contention, the assertions of exclusive dominion which Russia had asserted from about the parallel of 60° north latitude down to the parallel of 51°. The point of Mr Blaine was that the objectionable point of the Ukase in the eyes both of Great Britain and the United States was the assertion of exclusive territorial sovereignty over this coast and over the trade of that coast.

Now, that coast from the southern part of Alaska down to a certain part of the territory of the United States had been familiarly called in commerce, and by merchants and navigators who were engaged in trade there, the North-West Coast. It was the theatre of the rival enterprises of several different nations in commerce. The ships of the United States and merchants in the United States had a large trade up there; Great Britain had a large trade up there, and Russia had a very considerable trade up there.

**The President.** — And Spain.

**Mr Carter.** — And Spain, also, had some, though I do not know how much it amounted to commercially, — she had made pretensions, as we know, which were subsequently abandoned.

**Mr Phelps.**. — They were transferred to the United States.

**Mr Carter.** — They were transferred to the United States.

**The President.** — It was on account of the possession of San Francisco on that coast.

**Mr Carter.** — Oh! yes, lower down; Spain had great pretensions on account of her possessions lower down, but San Francisco was lower down than the North West Coast with which I am dealing. Spain claimed to

60°, I know, but I was talking of her commerce, which I do not think was very considerable. Her claims extended a considerable way; but I was speaking of the fact that the North West Coast, so called, was the theatre of a considerable trade principally carried on by the three great Powers, Great Britain, the United States and Russia.

Mr Blaine's argument was that the principal point of contention betwen these Governments was the sovereignty assumed by Russia over that coast, which, if successfully maintained by her, would exclude both Great Britain and the United States from the benefits of that trade. Now, according to Mr Blaine, and this was his argument, that contention was settled between the United States and Russia by the Treaty of 1824 and between Great Britain and Russia by the Treaty of 1825, and that the Ukase of 1821, except so far as it was modified and displaced by these Treaties, continued to stand. That was his main proposition. To a certain extent, the pretensions asserted by the Ukase of 1821 were yielded and surrendered by those two Treaties; and, so far as they were not thus yielded and surrendered, they continued to stand.

Now, according to his argument, the only particulars in which those pretensions were surrendered were these; — a boundary line was established, — a southern boundary limit to the pretensions of Russia; and that was 54°40'. The territory in dispute, which was between 60° and 51°, was thus divided, you may say, — 54°40' was taken as the dividing line. Down to that line by this Treaty, the sovereignty of Russia was recognised as complete and perfect; and, south of that boundary, the sovereignty of Russia was excluded by her agreement not to make any more settlements south of it.

Now, in the course of that whole discussion no pretension was ever made, by either Russia or the United States, to any trade in these regions or to any interest in these regions at all.

**Mr Foster.** — Great Britain or the United States.

**Mr Carter.** — Great Britain or the United States made no assertion to any interests in these regions of Behring Sea at all. They had none at the time, and everything embraced by those regions was in the undisputed possession of Russia, and there was no desire to interfere with it.

**The President.** — You speak of the coasts only.

**Mr Carter.** — Well, sir, I speak of the sea as well. I am giving Mr Blaine's argument now.

**Lord Hannen.** — Yes; not yours. I mean, you do not adopt it.

**Mr Carter.** — Well, I am not now adopting it no. Whether I adopt it or not, or how far I may adopt it, will be a subject of further debate; but this is his argument, that all the pretensions of Russia, whether upon the sea, or upon the land, North of 61°, and including all the islands in Behring Sea, and which constituted the southern boundary, were recognized as the undisputed possessions of Russia, and no contention made in reference to it.

**Sir Charles Russell.** — North of 54° 40', you mean.

**Mr Carter.** — No, north of 60°; I mean that at the time when the protests were made, and the negotiations were entered into, North of 60° was indisputably the property of Russia, and no contention made on the part of either Government in reference to it. The region of controversy was south of that, and between that and latitude 54° 40'. The whole controversy was in reference to that region, and the adjustment affected that region alone. It did not affect, and could not have affected the undisputed part of the matter. So, the final conclusion of Mr Blaine was that the pretensions of Russia, asserted by the Ukase of 1821, so far as respects Behring Sea, and the islands in Behring Sea, and so far as respects land and water both, are unaffected by the Treaties of 1824 and 1825, and, therefore they stand unaffected by those Treaties; but, because they were left unaffected by those Treaties, admitted by those two powers to be valid and legitimate. That is argument.

Now, how far that argument may be sound, and where it may be weak, if it is weak at all, will form the subject of a brief discussion, upon which I shall enter at a subsequent stage. I am now presenting merely the contentions contained in this letter of Mr Blaine.

The controversy and correspondence between these two parties kept varying from form to substance, and from substance to form, all along during this correspondence, sometimes discussing the real question in the controversy, and sometimes discussing the question which party was responsible for the delays and difficulties which attended the progress of the negotiation. A letter of the latter character I have next to notice, which is found on page 240.

This is a letter from Mr Blaine to Sir Julian Pauncefote and is designed to be an answer to Lord Salisbury's note which I have heretofore read, in which he endeavoured to throw off from the Shoulders of Great Britain the responsibility for the delay which had occurred in the negotiations which succeeded the abortive attempt between Mr Phelps and Lord Salisbury or which succeeded the failure of that attempt. I am not going to read that letter either.

**The President.** — You mean the failure of the draft convention?

**Mr Carter.** — No; I mean the general failure from the beginning. You will remember that Mr Blaine had written a note to Sir Julian Pauncefote marked by something of acerbity in which he bitterly complained of delays and difficulties attending the settlement of this question, chargeable on the conduct of Great Britain, and mainly occasioned by this, that Great Britain was constantly governing her actions according to the views and wishes of Canada. Of course whatever may be the necessities or the difficulties attending the settlement of a diplomatic controversy on the part of a Power like Great Britain when it affects one of her Dependencies, I can easily see that there are very serious difficulties attending such a settlement, another Power finding that the Government with whom they are dealing is governing its own actions by the wishes real or supposed of one of its Dependencies would naturally

come to feel some uneasiness and irritation. That was the feeling in which Mr Blaine had written his letter, and he had written at a period when Mr Phelps communicated his original proposition to Lord Salisbury which was promptly accepted by Lord Salisbury under circumstances which led the Government of the United States to suppose that a final determination of the controversy was at hand; why, that was first interrupted, and then suspended for a long time, and then finally retired from, and that, in consequence of the action of the British Government Lord Salisbury had undertaken to defend the British Government from those charges, and this is a reply from Mr Blaine for the purpose of showing that that defence is not a sufficient one, and that his original complaints of delays were well founded.

On the 2nd of August 1890 (this will be found at page 242 of the American Appendix) Lord Salisbury having succeeded in drawing Mr Blaine into a controversy respecting these Russian pretentions and the effect of the treaties of 1824 and 1825 respecting them, and having received Mr Blaine's argument on that point, replies to it at great length. The reply commences at page 242 and extends with its notes to page 263. Of course, it is wholly impracticable to read it here, and all that I can do, and all that is necessary to do is to briefly summarize that. Lord Salisbury's argument is this, that the publication of the Ukase of 1821 was the first notice which Great Britain had ever received or other Government's had ever received of any pretentions by Russia over the waters of Behring Sea and the north-west coast. He states that the pretensions of Russia made by that Ukase were to a sovereignty over the waters from Behring Straits down to latitude 51° on the American shore and down to latitude 47° I think on the Asiatic shore, thus asserting a sovereignty, not only over Behring Sea, but over a large part of the ocean south of that Sea, and he insists that the principal point of the objections of Great Britain to this pretension on the part of Russia was not this matter of sovereignty and the north-west coast which Mr Blaine conceived it to be, but this assertion of maritime dominion over the high seas. He asserts that was the principal point of complaint of Great Britain

He says that that was squarely abandoned by the Treaty concluded between Russia and Great Britain of 1825, — that the assertion was one of complete dominion over the sea, and that that assertion was abandoned by the express terms of the Treaty, and he insists that the words " Pacific Ocean " — I am now going to read from the 1st Article of the Treaty between Great Britain and Russia of 1825, which is found on page 39 of the 1st Volume of the American Case for the purpose of showing what the argument of Lord Salisbury was. The first Article is. " It is agreed that the respective subjects of the high Contracting Parties shall not be troubled or molested in any part of the Ocean commonly called the Pacific Ocean either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied in order to trade with the Natives under the restrictions and condi-

tions specified in the following Articles ". Mr Blaine's argument had been there that " Pacific Ocean " as used in the 1st Article of the Treaty did not include Behring Sea, but only the Ocean south of that Sea. Lord Salisbury's argument now is that " Pacific Ocean " did include the whole of Behring Sea, and the controversy between those two officials, — those two Diplomats, now became substantially confined to that particular point, whether the term " Pacific Ocean " as used in the 1st Article of the Treaty between Russia and Great Britain, and the similar term in the 1st Article of the Treaty between Russia and the United States, was really intended to embrace Behring Sea, or only the waters south of that Sea.

This debate on the question of the pretensions of Russia came finally to concentrate itself very much on that particular point, and Lord Salisbury's argument was a very full one and a very able one, designed to show that " Pacific Ocean " was intended to include the whole of Behring Sea.

**The President.** — Mr Carter, I must call your attention to this fact, that, if you want to interpret the Treaty of 1825, the original text is a French text and what you read was the English version, which has not an official character, and there is a certain difference which I have remarked between the French text and the English text, — the English version will show it.

**Mr Carter.** — When I come to the question of the discussion of the merits, I will deal with that, Sir.

**The President.** — Yes; you do not discuss it actually now?

**Mr Carter.** — No; I will wait until I come to the discussion of the merits. I will then say something as to the text of the Treaty which was made, but will not enter into a discussion of it at this point, unless the learned President thinks there is something that has an immediate bearing on it?

**The President.** — In the translation, it is " In any part of the Ocean commonly called the Pacific Ocean ".

**Mr Carter.** — Yes. Those conditions have relation to the merits of the controversy; and when I come to discuss the merits, I will say something on those points, but not here.

**The President.** — No. It is better not to stop on it now.

**Mr Carter.** — Now to this letter of Lord Salisbury Mr Blaine rejoins on the 17th of December, 1890, and the letter will be found at page 263. He reiterated his position there in a very long letter, and a letter also written, I venture to say it will be admitted, with very great ability, sustaining his contention that the term " Pacific Ocean " did not include the Behring Sea. At this time Mr Blaine, gradually becoming more and more interested in this discussion, and giving, I suppose, more and more attention to it, became more and more convinced of the solidity of the ground upon which he stood; and he seemed to be almost ready to surrender every other gro d in the case, and put the issue of the controversy upon

this. He was not very cautious in that particular, and allowed an expression to fall from him which the quickness of my learned friend, Sir Charles Russell, I remember, pitched upon the other day. He says this — the date of it, I think I said, is the 17th of December, 1890.

**Sir Charles Russell.**. — Are you going to read this at length?

**Mr Carter.** — No, far from it.

**Sir Charles Russell.**. — Because, if so, it would be necessary to read the others which are referred to in it.

**Mr Carter.** — No far from it. I am only going to read a few lines :

The considerations advanced by his Lordship have received the careful attention of the President, and I am instructed to insist upon the correctness and validity of the position which has been earnestly advocated by the Government of the United States, in defence of American rights in the Behring Sea. Legal and diplomatic questions, apparently complicated, are often found, after prolonged discussion to depend on the settlement of a single point. Such, in the judgment of the President, is the position in which the United States and Great Britain find themselves in the pending controversy, touching the true construction of the Russo-American, and Anglo-Russian treaties of 1824 and 1825. Great Britain contends that the phrase (Pacific Ocean), as used in the treaties, was intended to include, and does include, the body of water which is now known as the Behring Sea. The United States contends that the Behring sea was not mentioned or even referred to, in either treaty, and was in no sense included in the phrase (Pacific Ocean).

This is the passage to which I desire to call the attention of the Arbitrators :

If Great Britain can maintain her position that the Behring Sea at the time of the Treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well grounded complaint against her. If, on the other hand, this Government can prove beyond all doubt that the Behring Sea at the date of the Treaties was understood by the three signatory powers to be a separate body of water, and was not included in the phrase (Pacific Ocean), then the American case against Great Britain is complete and undeniable.

Well now the extraordinary thing in that observation, and which I designed to call the attention of the learned Arbitrators to is this. Mr Blaine in his first note to Sir Julian Pauncefote stating the position which the United States took in reference to this controversy, and the ground upon which it based its claims to prohibit pelagic sealing in Behring Sea dismissed from consideration altogether this question of Russian authority and Russian pretensions or any right derived by the United States from Russian authority or Russian pretensions. He then proceeded to put the controversy upon grounds of essential right in reference to these seals setting forth the lawful and useful character of the industry carried on by the United States in the Pribilof islands, an industry useful to themselves, useful to mankind and setting forth the destructive nature of pelagic sealing as carried on by these Canadian sealers and its indefensibility on moral grounds — that it was an industry wrong as being injurious to property in the interests of the United States and the latter Power was clothed with full authority to prevent the commission of that wrong. These were his grounds. He perhaps somewhat injudiciously apparently abandons that view and choses to say that if Great Britain can maintain

her meaning in reference to the meaning of the words « Pacific Ocean » the United States has no well grounded complaint.

**Senator Morgan.** — If you will allow me, Mr Carter, to interrupt you just there, I think Mr Blaine deserves some vindication.

**Mr Carter.** — I am going to vindicate him.

**Senator Morgan.** — I hope you will. On the 29th day of April, preceding this letter by several months from which you have been reading, the British Government, through Sir Julian Pauncefote, sent to Mr Blaine a draft Convention from which I will read the preamble. The Government of Russia and the United States having represented to the Government of Great Britain the urgency of regulating by means of an international agreement the fur seal fishery in Behring Sea, the Sea of Okhotsk and the adjoining waters for the preservation of the fur seal species in the North Pacific Ocean, — making there a distinction between Behring. Sea, the Sea of Okhotsk and the North Pacific Ocean. — I will not read the whole of the preamble, but it seems to me that Mr Blaine had at the time he wrote the letter on which you are commenting an acknowledgment from the British Government that there was a distinction betwen Behring Sea, the sea of Okhotsk and the North Pacific Ocean, so that I think he was not quite out of the line of reason, to say the least of it, in claiming that there was a distinction which had been maintained for many years.

**Mr Carter.** — It may be that the British Government had acknowledged the difference of character in question, but I hardly think that the Government of Great Britain intended to acknowledge any such difference as that, I do not so interpret it, but in the next place, whether they acknowledged it or not, I think it was, if I may be so bold as to offer a criticism — I ought perhaps not to, but nevertheless it seems to me it was a piece of imprudence on the part of Mr Blaine to abandon the ground he first assumed in consequence of the confidence which he felt in the new position he was taking upon this question of the pretensions to Behring Sea.

He might have argued the question about the rights of the United Sates as acquired from Russia. It would not have affected that argument at all; and there was no occasion whatever for an apparent postponement of the ground which he had originally taken in his first letter to Sir Julian Pauncefote. Well, singularly enough, however, in this very same letter, and towards the end of it, he again reserves his original ground, near the close of this letter, this long letter; it will be found at the last paragraph of page 286. Mr Blaine thus writes :

> The repeated assertions that the Government of the United States demands that the Behring Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. At the same time the United States does not lack abundant authority, according to the exponents of International Law, for holding a small section of the Behring Sea for the protection of the fur-seals.
>
> Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the Sea or any part thereof *mare*

*clausum*. Nor is it by any means so serious an obstruction as Great Britain presumed to make in the South Atlantic, not so groundless an interference with the common law of the sea as is maintained by British authority to-day in the Indian Ocean. The President does not, however, desire a long postponement which an examination of legal authorities from Ulpian to Phillimore and Kent would involve.

**He finds his own views well expressed by Mr Phelps, our late Minister to England, when, after failing to secure a just arrangement with Great Britain touching the Seal Fisheries, he wrote the following in his closing communication to his own Government, September 12, 1888. And then he proceeds with the citation from Mr Phelps.**

Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case. Here is a valuable fishery, and a large and, if properly managed, permanent industry the property of the nations on whose shores it is carried on. It is proposed by the Colony of a foreign Nation, in defiance of the joint remonstrance of all the countries interested to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighbouring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free. The same line of argument would take under its protection piracy and the Slave Trade when prosecuted in the open sea or would justify one Nation in destroying the commerce of another by placing dangerous obstructions and he relicts in the open sea near its coasts.

There are many things that cannot be allowed to be done on the open sea with impunity, and against which every Sea is *mare clausum*, and the right of self-defence as to person and property prevails there as fully as elsewhere. If the fish upon Canadian coasts could be destroyed by scattering poison in the open sea adjacent with some small profit to those engaged in it, would Canada, upon the just principles of International Law, be held defenceless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this. If precedents are wanting for a defence so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best International Law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.

I have the honour to be, etc.,

JAMES G. BLAINE.

**So that the Arbitratrors will see that he goes back to his original ground and puts his case on the question of property and the essential right to defend property-interests on the high seas against acts which are in themselves *contra bonos mores* — reasserting his original principle.**

**Now, I am obliged to admit that these two attitudes taken by Mr Blaine in this letter — one at the beginning, and the other at the end are inconsistent and self contradictory, but it is nevertheless true that inasmuch as the last attitude is taken at the end of his letter the position of the United States, as originally assumed, was not by this letter, (as it never had been by any other) substantially, or in *any* respect, indeed, changed.**

**Now Lord Salisbury had the last word on this subject, he rejoined to Mr Blaine in a letter dated February 21st 1891.**

**Sir Charles Russell.** — Comparatively short.

**Mr Carter.** — Comparatively short, but not short enough for me to read; nor is it necessary for me to describe it or to say anything on it, except that it was a reiteration of his own original positions, and a respectful statement that the argument of Mr Blaine on the other side was not satisfactory, closing (I believe as is usual with these polite gentlemen) with some conciliatory observations, and also containing some discussion of the points of the proposed Arbitration: for the Arbitrators will remember that while this discussion upon the merits of controversy was going on, another discussion was also going on between the parties *pari passu* concerning the features of the Arbitration towards which the correspondence and the negociation was gradually tending.

Now there was a good deal of correspondence after this, but it contains very little — nothing — which imports into the controversy any specially new feature, which it is important for me to bring to your attention at this time. The debate was exhausted: the disputants had stated their views, and they had not approached an agreement at all upon any of the questions in controversy. The necessity for some mode of adjustment in order to prevent a very lamentable result, became more and more apparent to each party, and approaches were gradually made to a final agreement for an arbitration. Much discussion took place in reference to the points which should be submitted, but there was not very great difficulty experienced in coming to an agreement there. The remaining discussion therefore embraces the controversy concerning the shape which the Arbitration should take; and all that it is necessary for me now to say in reference to it, is this: that as finally agreed upon, it still presented its original aspect of a scheme with two alternative features — one contemplating that there should be a mixed Commission of experts which should make enquiries in relation to seal life, and pelagic sealing, and as to what regulations were necessary to preserve the seals, and report upon that: that if the two Governments, upon receiving that Report, should find themselves able to agree upon a scheme of regulations, why the Arbitration would become unnecessary. That was not an express, but it was an implied feature all along. It was borrowed from the original suggestion of Sir Julian Pauncefote. But if there was a failure to agree, then, of course, it would be necessary that the Arbitration should proceed; and, when it did proceed, it should embrace all the questions in dispute — all the questions in relation to the original pretentions of Russia, and to the rights which the United States may have derived from Russia, grounded upon those pretentions: next, the question of the alleged property interest of the United States in the seals, and in the industry which was maintained in respect of that animal upon the Pribilof Islands; and then if the determination of the Tribunal upon these questions, (which are properly called by my friend Sir Charles Russell, questions of right), should leave the subject in such a condition that the concurrence of Great Britain was necessary to the establishing

of Regulations for the preservation of the fur-seal, then the Arbitrators should consider what Regulations were necessary.

**The President.** — In that contingency.

**Mr Carter.** — In that contingency, and only in that contingency. The duty of the Arbitrators is most plainy specified here as to what they are to do, and the times at which they are to do it. The question of what evidence should be acted upon, and when it should be submitted, has already been argued, and of course I shall say nothing about that. Now when the parties were brought to a substantial agreement upon these points, the agreement for the arbitration, and the agreement for the mixed Commission of experts were drawn up separately, and signed separately on the 18th of December 1891; and in accordance with the design of settling the matter by Convention on the basis of a joint Report, the Commissioners who were at once appointed on the part of Great Britain proceeded up to Behring Sea for the purpose of making their investigations long before the Treaty was finally drawn up and signed. But in February 1892 those two agreements, thus far kept separate, were finally consolidated in the Treaty; the Treaty was signed and ratified.

That concludes the second stage of the controversy; and, in a word or two, allow me to recapitulate the principal features of this second stage of the controversy. It opens with a treatment of the question by President Harrison, and his Secretary of State, Mr Blaine; proclamations designed to prohibit pelagic sealing; instructions to cruisers to enforce the law; seizure of British vessels; and, consequently, renewal of the protests by Great Britain. Next, a consideration by President Harrison, and his Secretary Mr Blaine, of the real grounds upon which the United States defended their action in making those seizures upon Behring Sea, and a setting forth of those grounds in their full extent — a course which had not, as yet, been taken by the Government of the United States. Mr Bayard, having purposely avoided the discussion of such questions, contented himself with a suggestion of the grounds upon which the United States proceeded, and directing his efforts to remove the controversy without discussion by international agreement.

The next step in this stage was a renewal of the negociations for a settlement between the two Governments, a proposal by Sir Julian Pauncefote of a draft Convention which contained the germ of a qualified and limited Arbitration: then the answer of Lord Salisbury to the arguments upon which Mr Blaine had defended the conduct of the United States; and an attempt by Lord Salisbury, as I have styled it — (perhaps that will not be agreed to by my friends on the other side) — to avoid a discussion of the grounds upon which Mr Blaine had undertaken to defend the position of the United States. Next, the introduction of this matter of Russian pretentions in Behring Sea; the Ukase of 1821; the Treaties of 1824 and 1825, and this question of what was meant, and how much was included by the phrase "Pacific Ocean", as it is used in both those Treaties. Next, the carrying forward of the proposition for Arbi-

tration, and the rejection of the suggestion of an Arbitration — two distinct points — and final agreement in reference to it; and, finally, the combination of the agreements into the Treaty creating this Arbitration: the signing of that Treaty, and its ratification by both parties.

Now there is still another stage, but it is a very short one, and briefly told — that is the third stage of the controversy, and its reference to the action of the two Governments under the Treaty. The Commissioners were appointed upon both sides; they visited Behring Sea; they examined the conditions of the rookeries there; they made such suggestions as they chose to make, and were able to make, concerning seal life. They, or some of them — the British Commissioners at least — went over the seal islands of Russia on the Asiatic shore, and they examined the business of pelagic sealing, its tendencies, and so forth. They came together; they attempted to agree, but they found themselves unable agree except in one on two limited conclusions. They were agreed in this: that the herd of seals which made its home upon the Pribiloff Islands, was in the course — I can hardly say that — but that its numbers were in the course of diminution; that such diminution was accumulating — that is, it was increasing — and that it was in consequence of the hand of man.

There they stopped, and were unable to go any further. What the causes were which prevented them from being able to go any further in harmony, are, to my mind, very plain, but this is not the moment at which I should state them. It is enough for the present purpose to say that upon all other matters they disagreed, and therefore the hopes of the two Governments of being able to come to a Convention in respect of the Regulations upon an agreeing joint Report of those Commissioners, were disappointed, and it became necessary that the Arbitrators should be called together. This disappointment of hopes occurred at a considerable period before the time when any step was recognized in reference to the Arbitration by either party, but this failure having occurred, the Arbitrators were appointed; the parties proceeded to frame their Cases, and their Counter-Cases, and to exchange them, and to prepare their arguments for submission to this Tribunal, and here we are.

That, Gentlemen, is, as well as I can state it, a concise account, although it has been rather a long one, of the various stages of this controversy, and I hope it will have tended in some degree to enable you to view this controversy in the lights in which, from time to time, the parties themselves have viewed it; and therefore you understand the precise questions which arise, the precise difficulties which are presented, better than you otherwise would. I shall, therefore, next proceed with the next step in the argument of the Case.

**Senator Morgan.** — Mr Carter, before you proceed, will you allow me to call your attention to some dates about which possibly there is some misunderstanding. I understand that these Commissioners were in fact appointed before any convention was signed.

**Mr Carter.** — Yes.

**Senator Morgan.** — They entered upon their work and completed it so far as the investigation was concerned before any convention was signed; and when they made their report a convention had been signed, but it had not been ratified by either Government, and ratifications had not been exchanged.

**Mr Carter.** — I am not able now to say what the fact was in that particular as to dates.

**Senator Morgan.** — I desire to present that because it is in my judgment an important fact, I know it is a fact because the record shows it.

**Mr Foster.** — They adjourned on the 4th of March and the Convention was ratified by the Senate.

**Senator Morgan.** — They completed their labours, making their joint report and a separate report to each Government, before the Senate of the United States acted upon that convention, and before ratifications were exchanged.

**Mr Carter.** — I believe that to be so, but I have not the dates.

**Senator Morgan.** — Therefore, there was no treaty at the time they made that report.

**The President.** — But there was an arrangement between the Governments — precisely the arrangement which was signed afterwards, on the 18th of December 1891. There was an arrangement made in June 1891, if I remember which you read us a few days ago, an arrangement in seven articles, providing for the Joint Commission to be sent out. That was not signed; but it was an arrangement between the Governments. It was not signed or ratified, since it had not been submitted to the American Senate.

**Senator Morgan.** — The President does not seem to apprehend exactly that no arrangement made between the diplomatic functionaries or the United States, and any other Government, of the character mentioned here, has any effect whatsoever upon the laws of the United States until it has been ratified by the Senate; and the ratification took place not only after the arrangement was made, but after the report was made.

**The President.** — The 7th of May 1892.

**Mr Justice Harlan.** — The separate report of the British Commissioners was made June 1st 1892, and the exchanges of ratification occurred May 7th 1892.

**Senator Morgan.** — I refer to the Joint Report after which as I understand it, the Commission, as a Commission, was dissolved. And each of the Commissioners went on, whether rightfully or wrongfully, I am not prepared to say, to make subsequent thereto, their separate reports to their respective Governments.

**The President.** — That is perfectly correct.

**Mr Carter.** — The statement by the learned Arbitrator is entirely correct.

**Senator Morgan.** — The Commission finally adjourned on the 4th of March. The ratification of the Treaty was had on April 22nd.

**Mr Justice Harlan.** — The ratification ?

**Senator Morgan.** — The ratification by the President.

**General Foster.** — It was proclaimed May 9th.

**Mr Carter.** — (Reading) " Concluded at Washington February 29th, 1892; ratification advised by the Senate, March 29th 1892; ratified by the President, April 22d 1892; ratifications exchanged, May 7th 1892; proclaimed, May 9th 1892 ". That is on the first page of volume I of the Appendix.

**Senator Morgan.** — It was proclaimed by the United States as an amended Treaty, putting the Treaty as originally ratified by the Senate and the *Modus vivendi* which came in as a supplementary Treaty, or an amendmentof a former Treaty, together, and constituting one instrument to be construed *in pari materia*

**The President.** — That had no legal force, I suppose, before it was proclaimed in the United States.

**Mr Carter.** — None at all; It could not have had either in Great Britain or the United States.

**Mr Phelps.** — There were also other amendments added by the Senate.

**Senator Morgan.** — There were two amendments of a distinct character, each as to a subject not entirely foreign to, but independent of, the *Modus vivendi*.

**Mr Carter.** — In the view I had taken of it, the circumstances under which this Commission was appointed and proceeded to its labors prior to the ratification of the Treaty, is not of material importance.

**Senator Morgan.** — May be not.

**Mr Carter.** — In the view I take of it itmay or may not be that that action was illegal. Whatever the truth is, however, this must be true, — that the diplomatic representatives of the Governments had come to a formal agreement that this should be done. They had come to an agreement also in writing that this should be done, although that writing was not in a form making it a Treaty. That is plain enough. It was highly important that all of this preliminary work should be done as soon as possible. It was necessary in order to carry out the scheme contemplated by that Treaty. It was all done by the parties in good faith and I should hope that it would be allowed to be considered as having effect according to the intent of the parties. I should indeed myself be inclined to argue that the ratifications having been exchanged between the Governments with full knowledge that these proceedings had already been had beforehand and that it was the design of the pending Treaty that they should be had, that the ratifications of the Treaty would have an effect, as we lawyers say, by relation, and go back and make good these prior proceedings which otherwise might have been invalid.

**Senator Morgan.** — If the learned counsel will allow me, that is preci-

sely the view I take of the matter, that the subsequent ratification of these treaties whether there are two or whether there is one, relating to the action of the Commissioners authorized by that diplomatic correspondence, is an adoption of what those Commissioners had done: but that operates upon what they had done, as I conceive, and it did not operate to give them any authority *in futuro*.

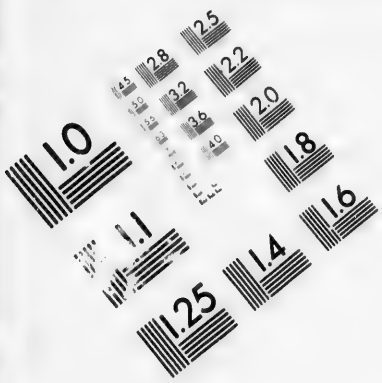
**Mr Carter**. — Oh no; I should suppose not. But the fact which is suggested by the learned Arbitrator is entirely in accordance with my own view.

I now pass to the next matter which, as it seems to me, in the order I have prescribed, it is proper for me to consider.

There is still a second question, somewhat preliminary to the argument of the main questions in controversy, upon which it seems to me important that I should address a few observations to the Tribunal and that question is as to the law which is to govern it in its deliberations.

This is a Tribunal composed of the citizens of different nations, part belonging to the nations between whom the controversy subsists and in part coming from other nations-They are sitting under no municipal law whatever. The authority of the courts of Great Britain, the authority of the courts of the United States, as authority, are as nothing here. This is an international Tribunal. And then, too, there is no international legislature which has adopted any law in relation to these or any other subjects which can be administered or applied. Therefore in a certain sense, and in the sense in which we speak of law when we are engaged in a controversy before municipal tribunals, there is no law at all. Yet we cannot suppose that questions of this sort are to be discussed debated and determined by this Tribunal without its being bound by some rule or some system. What then is the law which is to govern us? I suppose I might appeal with entire confidence to the conscientiousness and the immediate conviction of each one of the members of this Tribunal, that the decision of the controversy is to be governed by some rule of right. What that particular rule may be, where it is to be sought, is another question; but the decision is to be governed by some rule of right.

I heard with infinite pleasure my learned friend Sir Charles Russell upon one occasion when he was addressing you, say that the first five questions mentioned in the Treaty were what he might properly enough call, he thought, questions of right, and that they were questions of right which must be decided by the members of this Tribunal as jurists. I concur in that view of those questions thus taken by him and anticipate, indeed, that it will never be receded from by him. How else could it be? This is called an arbitration; but very plainly it is not an arbitration of that character which very frequenty takes place between man and man. Oftentimes in controversies between individuals it is of far higher importance that the particular controversies should be in some manner settled and the parties left at peace, than how it shall be settled, and therefore in such cases the decision is often reached by some reci-





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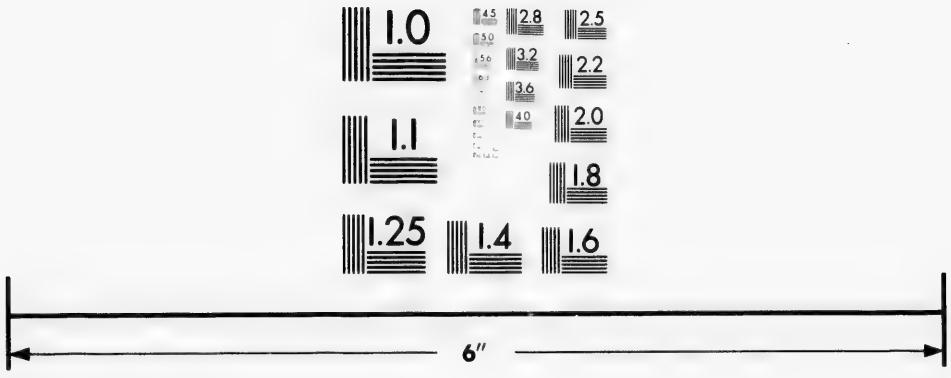



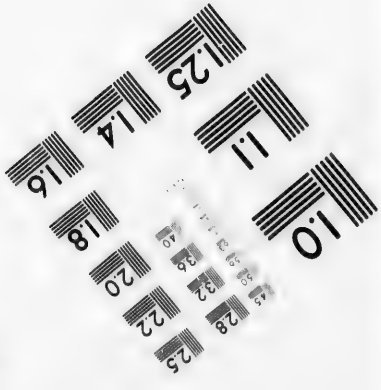


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procal process of concession, giving a little on one side and conceding a little on the other, and so on until finally an agreement is reached without a resort to any particular principle. That is not the way to deal with this controversy. It is of a totally different character. If it could have been disposed of by mutual compromise and concession it would never have been brought before this arbitration. The parties themselves could have settled it. They are quite competent to say how much they will be willing to yield on this point and how much they depend upon the other, and by mutual compromise and concession to finally reach a point upon which they are willing to agree; but the difficulty in this case is that the parties were in difference in respect to their rights and they could never come to an agreement upon them. They differed as to the question of the powers a nation may exercise upon the high seas in defence of its admitted rights of property in time of peace. They differed on the question whether the United States have a property interest in these seals and in the industry which has been carried on in respect to them on the Pribilof islands. Those differences they have never been able to reconcile. At variance with each other in respect to them at the start, subsequent discussion between the two parties has had the effect only of more widely separating them; and it is that controversy upon those questions of right which they have committed to your decision.

It is a question, too, necessarily of right. Why should they have called together a tribunal constituted of eminent jurists from several distinct nations and called upon them to make a decision of it unless they intended that the rules of right should be applied to it. Why should they have made a provision for counsel supposed to be learned in the law and learned in the fundamental principles upon which the law is founded, unless they supposed it was necessary to bring to the tribunal considerations of right in order to enable them to make a decision? Indeed how could counsel address this Tribunal unless it was supposed that there was a standard of right, acknowledged both by the Tribunal and the counsel who address it, to which they could appeal and upon which they could endeavor to persuade the Tribunal. And it is therefore very clear, as it seems to me, that the decision of this Tribunal is to be governed by some rule such as we understand to be a rule of right. Any other rule, I assume, would not be satisfactory to either party. It certainly would not be satisfactory to the United States. I think I may safely say that however valuable this seal herd may be to the Government and people of the United States a decision affirming their full and exclusive right to it made by this Tribunal, unless it were made upon grounds of right, would not be acceptable. It is of far greater importance to the United States, as it must be to every nation, that decision of any controversies to which it may be a party should be determined upon questions of right and that what questions of right are between nations should thus become final and permanently settled, than it is to gain any mere temporary advantage not based upon such principles.

A decision, therefore, of the controversy upon any other grounds would not be acceptable to the United States, and I suppose my learned friends upon the other side will be inclined to say the same thing in reference to Great Britain.

There is another consideration. The principles which are involved by the controversy affect the most permanent enduring and wide-spread interests. Certainly nothing can be more important than a determination of the question of the rights one nation may exercise against the citizens and the property of another nation upon the high seas in time of peace. This is a question, some aspects of it well enough settled, some aspects of it quite novel, requiring additional exploration, additional elucidation and additional determination. It is a question of the gravest and most important character; a question upon which differences are likely to embroil nations in hostilities and to break up the peace of the world. And then again that other question, the circumstances under which a nation may assert a right of property in animals who resort to the seas for a greater or less time during the year, and therefore an animal who at different times may place himself under the power of citizens belonging to different powers of the earth. Where the citizens of different nations are likely to make and to assert conflicting claims, what question of greater importance can there be than to determine the principles upon which such conflicting claims may be resolved, to determine the fundamental principles upon which the institution of property stands?

These are questions, the permanent importance of which far outweigh the particular interests of the contending parties to his controversy; and I must therefore express the hope that they will be settled as my learned friend says they ought to be settled, by this Tribunal, looking to them as jurists and feeling the responsibilities of jurists. The judgment which is awaited from this Tribunal is, will be, or ought to be a monument or rather an oracle to which present and future times as well, may appeal as furnishing an indisputable evidence of what the law of the world is.

Therefore I think myself justified on this occasion in appealing to every member of this Tribunal — I think it is not unbecoming in me to make that appeal — to discharge from their bosoms and dismiss every sentiment of partiality and even of patriotism and look upon this question as if they were citizens, not of this country or of that country, but citizens of the world, having in charge and having only in charge the general interests of mankind. The promptings of patriotism, everywhere else to be heeded, should be silenced here, and nothing should be obeyed except the voice, the supreme voice, of justice and the law.

But while it is to be a rule of right that is to govern the determination of this Tribunal, what is that rule of right and where is it to be found? In saying that it is to be a rule of right it is assumed — it is indeed declared — that it must be a moral rule; that is to say, it must be a rule adopted by the moral sense; for there are no rules of right except moral

rules. Right and wrong have to do with morality and with morality alone. The law, whether it be international law or municipal law is but a part of the general domain of ethics. It may not include the whole of that domain, but the centres of each system coincide, although the circumference of one may extend beyond the circumference of the other.

When I say that this must be a moral rule, that is a rule dictated by the moral sense, I do not mean, of course, that it is the moral sense of any individual man, or of any individual nation, because there are difference in the moral convictions of different men and of different nations. It is a controversy between nations. We cannot apply to it the moral standard either of one or of the other, or of any particular nation. Where, then, can we find it? I submit to you that we must find the rule in that general moral standard upon which all civilized nations and the people of all civilized nations shall agree. We cannot take the opinions of one; we cannot take the opinions of another. We must take that standard upon which all civilized nations are agreed; and that there is such a standard I can have no manner of doubt.

This whole proceeding would be out of place if there were not. I could not with any propriety or relevancy stand up and address an argument to this tribunal unless there was some agreed standard between them and me to which I could appeal, and upon which I can hope to convince. There is, therefore, an agreed standard of morality and of right, of justice and of law, agreed upon among all civilized nations and among the people of all civilized nations. It is just as it is in municipal law. There is a standard there. When controversies are brought before a municipal tribunal it is most generally the case that there is no particular statutory law which governs their decision, and it is very often, and perhaps in most controversies the fact that there is no particular prior decision or precedent which will serve as a rule of decision; and yet the courts make a decision.

How do they reach it? Why it is because the judges of municipal tribunals are judicial experts, whose business it is to ascertain the general standard of justice of their own country and to apply it to the controversies which are brought up before them. The general standard of justice in a municipal society is so much of the general rules of morality and ethics which that particular society chooses to enforce upon its members.

And so, also in the large society of all nations, there is a similar rule. There is a general international standard which embraces so much of the principles of morality and ethics as the nations of the world agree shall be binding upon them. That is international law, founded upon morality, founded upon that sentiment implanted in the breast of men wherever they are, that sentiment of right and wrong. It is this alone which enables them to engage in society with each other; it is this alone which enables them to live at peace with each other; and therefore the rule which this Tribunal is to adopt is the general standard of justice recognized by

the nations of the world which I conceive to be only another term for international law.

**The president.** Mr Carter, if you please we will continue to-morrow.

Before rising, I beg leave to state that the Tribunal intends taking a somewhat longer recess to-morrow. It will take its recess from one o' clock until two, which is an exception to our usual practice.

The Tribunal thereupon adjourned until to-morrow April 14, 1893, at 11 : 30 o'clock a. m.

## NINTH DAY. APRIL, 14TH, 1893

**The President.** — Mr Carter, will you please to continue your argument; and we shall be pleased to hear you.

**Mr Carter.** — Mr President, at the close of the sitting yesterday, I was speaking of the point of what law should govern the deliberations and the determination of this Tribunal; and I had, in the course of my argument upon that point, undertaken to shew that the rule which should govern must be some rule of right and, therefore, a moral rule founded upon moral considerations as all questions of right are founded, — not the moral rule which prevails in any particular municipal state of course, not necessarily the moral rule which governs the jurisprudence of both England and the United States if they should happen to coincide upon the point, but that moral rule which is generally recognised by the civilized nations of the world, — that moral standard of justice, that international standard of justice which is generally recognized, and it is only another name for international law. International law, therefore, is the rule which is to govern the deliberations of this Tribunal and to determine its decision. And what are the sources to which we are to look for this international law? For the most part international law is derived from and is determined by what is called the law of nature, a term very common with the writers on International Law. It is called the law of nature partly because it is a code, as far as it may be called a code, not derived from legislation having no origin in any sovereign legislature above all nations, for there is no such legislature; not derived from human institutions at all; but because it is found in the nature of man and in the environment in which he is placed. It is a necessity and an absolute necessity of human society, without which it could not exist, that there should be a moral law or rule by which the action of its individual members, in relation to each other, should be governed. This is true, of course, of all municipal states, and it is equally true of the larger society of nations. There could be no intercourse among nations, there could be no intercourse between individuals of different nations, unless there were some rule, some law, which would be recognized by them, and by which their transactions with each other should be governed, and in respect of the great society of nations, which is subject to no sovereign power, that law or rule is, for the most part, what is commonly called the law of nature. This is, indeed, the foundation not only of international law, but the foundation of all law, — municipal as well. All municipal codes are but attempts on the part of particular societies of men to draw from the law of nature, and re-enact and enforce them, upon its indivi-

dual members, and in those countries which are not governed very much by codes or by statutory enactments, — in those countries like England and America where the great body of jurisprudence is unwritten, still the decisions of the Tribunals which constitute the source and the evidence from which the law is ascertained, are derived from, in great part, the law of nature.

I must fortify what I say in that particular by a reference to some of the highest authorities on this subject and I wish to read a quotation from the celebrated disquisition of Sir James Mackintosh on the law of nature and nations. He says :

> The science which teaches the rights and duties of men and of States has in modern times been styled the law of nature and nations under this comprehensive title are included the rules of morality, as they prescribe the conduct of private men towards each other in all the various relations of human life; as they regulate both the obedience of citizens to law and the authority of the Magistrates in framing laws and ministering the Governments and as they modify the intercourse of independent commonwealths in peace and prescribe limits to their hostility in war. This important science comprehends only that part of private ethics which is capable of being reduced to fixed and general rules.

He thus points out the law of Nature as the source of all jurisprudence whether municipal or international and the same thought is, in terms which have often been cited by writers on international law, was expressed, before Sir James Mackintosh gave utterance to these sentiments, by Lord Bacon. He says :

> For there are in nature certain fountains of Justice whence all civil laws are derived, but as streams and like as waters do take tinctures and tastes from the soil through which they run, so do civil laws vary according to the regions and Governments where they are planted though they proceed from the same fountain.

This law of nature, as it is styled, is sometimes designated by different terms; sometimes as a natural law, sometimes as natural justice, sometimes as the dictates of right reason; but by whatever name it is described the something is always intended; and it means, in short, those rules and principles of right and wrong implanted in every human breast, and which men recognize in their intercourse with each other, because they are men having a moral nature, and brought into conditions with each other which compel the application of moral rules. I may cite a reference by one of the great authorities which all English lawyers are compelled, as it were, to study at the beginning of their instruction; that is Mr Justice Blackstone. He says :

> This law of nature being co-eval with mankind, dictated by God Himself, is, of course, superior in obligation to any other. It is binding over the globe in all countries, and at all times : no human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority mediately or immediately from this original.

And the dependency of all law upon the law of nature is very happily and clearly illustrated by those three great maxims which constitute the

basis of the jurisprudence of the Roman law, sometimes called the Ulpianic precepts. They amount simply to a reduction to their original form of the dictates of natural justice, or of natural law, and they are those familiar to every lawyer : *Juris precepta sunt hæc : honesta vivere, alterum non lædere, suum cuique tribuere.* Now some writers have at some times been inclined to dispute the authority of this law of nature on the ground that there is no supreme authority capable of enforcing its precepts. Of course, there is none, as far as nations are concerned. They are themselves supreme, and being supreme and sovereign there is no power over them, and there is no power, therefore, to enforce the dictates of this law, as there is a power to enforce the rules of municipal law upon the individual members of a municipal state. But that notion, I think mistakes, and has generally been agreed to mistake, the subject. It does not follow, because there is no authority to enforce the dictates of this law, that it is any the less binding for that. There are plenty of considerations which do enforce it. It is enforced, in the first instance, by the sense of right and wrong which dwells in the breasts of nations as it does in the breasts of individuals. The very sense of obligation is, of itself, a means of enforcing the law. It is enforced, in the next place, by the public opinion of mankind, which holds to a strict account every nation that undertakes to depart from or violate its dictates.

It is enforced, in the next place, by the disastrous consequences which Nature herself has ordained and made certain to flow from any disobedience to its precepts ; and this has been well expressed by a distinguished English writer on International Law — I refer to Sir Robert Phillimore ; the extract will be found on page 5 of my Argument. It is sometimes said that there can be no law between nations, because they acknowledge no common superior authority, no international executive capable of enforcing the precepts of international law. This objection admits of various answers : First, it is a matter of fact that states and nations recognise the existence and independence of each other, and out of a recognised society of nations, as out of a society of individuals, law must necessarily spring. The common rules of right approved by nations as regulating their intercourse are of themselves, as has been shewn, such a law. Secondly, the contrary position confounds two distinct things, namely the physical sanction which law derives from being enforced by superior power and the moral sanction conferred on it by the fundamental principle of right. The error is similar in kind to that which has led jurists to divide moral obligations into perfect and imperfect. All moral obligations are called perfect though the means of compelling their performance is, humanly speaking, more or less perfect, as they more or less fall under the cognizance of human law. In like manner, international justice would not be less deserving of that appellation if the sanctions of it were wholly incapable of being enforced. But, irrespectively of any such means of enforcement, the law must remain. God has willed the society of States as he has willed the society of individuals. The dictates of the conscience of

both may be violated on earth; but to the national as to the individua conscience, the language of a profound philosopher is applicable. Had it strength as it had right, had it power as it has manifest authority, it would absolutely govern the world! Lastly, it may be observed, on this head, that the history of the world and especially of modern times has been but incuriously and improfitably read by him who has not perceived the certain nemesis which overtakes the transgressors of international justice, for but to take one instance, what an Iliad of woes did the precedent of the first partition of Poland open to the Kingdoms who participated in that grevious infraction of international law! The Roman Law nobly expresses a great moral truth in the maxim " *Jurisjurandi contempta religio satis Deum habet ultorem.* " And I may add the authority, not of jurists and text-twriters upon this subject, but also of some of the most distinguished Judges who have administered not only the Municipal Law but International Law also.

First, let me cite another extract, I had noted from Sir James Mackintosh, and from the same disquisition to which I have already referred.

The duties of men, of subjects, of Princes, of lawgivers, of magistrates, and of states, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxims of moral philosophy and the most complicated controversies of civil and public law, there subsists a connection. The principle of justice deeply rooted in the nature and in the interests of man pervades the whole system, and is discoverable in every part of it, even the minutest ramification in a legal formality, or in the construction of an Article in a Treaty.

And Mr Justice Story says in his book on the Conflict of Laws.

The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return.

And the same great authority sitting as a judge declared in the case of " *LaJeune Eugénie*" in the 2nd Mason's Reports :

But I think it may be unequivocally affirmed that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations and the nature of moral obligations may theoretically be said to exist in the law of nations and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and custom, it may be enforced by a Court of justice wherever it arises in judgment.

Now the foundation of international law is, therefore, the law of nature and that is a system not evidenced by any written code, but is a body of moral rules, but it is a body of moral rules at the same time as to which men are not absolutely agreed. There are differences in the moral convictions of different men and there are differences in moral convictions of different nations and there are differences in the moral convictions of the same people and the same nations at different periods of time.

Law is a progressive system, advancing step by step with human pro-

gress, and it is constantly aspiring, as it were, to reach a more complete harmony with theoretical and moral rules. We cannot, therefore, in applying international law, apply those moral laws which we ourselves may deduce from our study of moral precepts. Others may not agree with us in that particular. But still, there is a great body of plain and simple moral rules upon which all men and all nations, may safely be presumed to agree; and to that extent we may enforce them. It is nevertheless, true that in human jurisprudence the actual doctrines which are enforced by the individuals of a municipal state, or which are yielded to and recognized by nations, do not come up to the elevation of the law of nature. That is a system of very high standards which are not at all times recognized in the practice of men. And where they do thus stand above the actual practice of men, of what we have to enforce, as we can enforce only what is agreed upon, is the rule as far as it is are actually recognized.

That truth has been rather strikingly illustrated in the case of the slave trade. Very few enlightened men could be found who would not say that the slave trade was essentially and absolutely wrong; very few could be found who would not say that it was absolutely contrary to law of nature. But is it against human law? Have the world and the nations of the world heretofore so far recognized the pure and true principles of natural law as to carry them out to that consequence of forbidding the slave trade. That question has arisen judicially before several tribunals. It arose in the United States Supreme Court, and called for the consideration of Chief Justice Marshall. The question was whether to the Supreme Court of the United States could execute a municipal law which declared the slave trade to be piracy, as against the citizens of another nation. He held the slave trade was against the law of nature, undoubtedly, but at the same time, when we come to take into consideration the extent to which the nations of the earth had been addicted to the practice, he said it was impossible to declare it was against the law of nations, and therefore held that a municipal law of the United States, aimed against the slave trade, could not be executed against the citizens of another nation. A similar decision, upon similar grounds, was made by a distinguished English judge, equally illustrious. I refer to Lord Stowell.

Where, then, are we to look for the true evidence which is to enable us to ascertain what the law of nations is in any particular case? First, let me say, to the actual practice and usages of nations, for the practice and usages of nations must import the points upon which they are agreed; and where the practice and usages of nations speaks, we need look no further. But the practice and usages of nations does not speak in but a comparatively few cases; it really covers but a very small part of the questions which sometimes arise, and of the still larger number of instances which by possibility may arise, and at some time or another certainly will arise, in the intercourse of nations. In the municipal law of States, the case is otherwise. Particular States have a regular establishment of Courts. They employ a regular body of experts

called Judges. The controversies between man and man are innumerable, and they have been continued for thousands of years, and therefore the science of Justice, and the law of nature, so far as it is applicable to the relations between individual men have been so assiduously cultivated in municipal law that we may say there is scarcely a point which remains still to be determined. In international law, it is otherwise. The points in which nations come into connection with each other, or into collision with each other, are comparatively few, and therefore the occasions for the study, the development and the application of the law of nations have, in the course of history been comparatively few. For the most part, therefore, when new questions arise, we are referred at once to the law of nature, which is the true source upon which the whole system of the law of nations rests. And there we are entitled to take, as law, the plain deductions of right reason from admitted principles unless we find that those plain deductions have somewhere, or somehow, not been recognized by the nations of the earth in their actual intercourse with each other.

I desire to read one or two more extracts from writers of eminence upon International law in corroboration of the views which I have taken, and I will read a passage from Mr Pomeroy, a distinguished American writer, the head of the Law School of the University of California. He says :

> What is called international law in its general sense, I would term international morality. It consists of those rules founded upon justice and equity, and deduced by right reason, according to which independent states are accustomed to regulate their mutual intercourse, and to which they conform their mutual relations. These rules have no binding force in themselves as law; but states are more and more impelled to observe them by a deference to the general public opinion of Christendom, by a conviction that they are right in themselves, or at least expedient, or by a fear of provoking hostilities. This moral sanction is so strong and is so constantly increasing in its power and effect, that we may with propriety say these rules create rights and corresponding duties which belong to and develope upon independent states in their corporate political capacities. We thus reach the conclusion that a large portion of international law is rather a branch of ethics than of positive human jurisprudence. This fact, however, affords no ground for the jurist or the student of jurisprudence to neglect the science. Indeed, there is the greater advantage in its study. Its rules are based upon abstract justice; they are in conformity with the deductions of right reason; having no positive sanction they appeal to a higher sanction than do the precepts of municipal codes. All these features cloth them with a nobler character than that of the ordinary civil jurisprudence, as God's law is more perfect than human legislation.

The observation of Mr Pomeroy that these rules have no binding force in themselves as law is not a correct one. In my view at least they have a binding force in themselves, as law at all times, and in all places. And as Mr Justice Blackstone remarks, a binding force greater even in one sense, certainly, than any human law. The same view was taken by the Government of Great Britain in a celebrated paper, I think drawn up by Lord Mansfield himself which was a response to a memorial by the Prussian Government — a paper which was pronounced by Montesquieu

*réponse sans réplique* and has generally been recognised as a very correct statement. I am reading now from the 12th page of my book.

The law of nations is said to be founded upon justice, equity and convenience, and the reason of the thing, and confirmed by long usage.

And Chancellor Kent has spoken to same point and with great clearness. He says:

The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent and agreement, but it would be improper to separate this law entirely from national jurisprudence and not to consider it as deriving much o its force and dignity from the same principles of right reason, the same views of the nature and constitution of man and the same sanction of divine revelation as those from which the science of morality is deduced. There is a natural and a positive law of nations. By the former every State in its relation with other States, is bound to conduct itself with justice good faith and benevolence; and this application of the law of nature has ben called by Vattel the necessary law of nations because nations are bound by the law of nature to observe it; and it is termed by others the internal law of nations, because it is obligatory upon them in point of conscience.

We ought not, therefore, to separate the science of public law from that of ethics, nor encourage the dangerous suggestion that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers as they are in the management of their own local concerns. States or bodies politic are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch, as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life. The law of nations is a complex system composed of various ingredients.

It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relations and conduct of nati s, of a collection of usages, customs and opinions, the growth of civilisation and commerce, and of a code of conventional or positive law. In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and the duties of nations and the nature of moral obligations; as we have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science. The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age and upon all mankind.

And a French writer, Hautefeuille, has spoken to the same point. He says:

He (God) has given to nations and to those who govern them a law which they are to observe towards each other, an unwritten law, it is true. but a law which He has taken care to engrave in indelible characters in the heart of every man, a law

which causes every human being to distinguish what is true from what is false, what is just from what is unjust, and what is beautiful from what is not beautiful. It is the divine or natural law. It constitutes what I shall call primitive law. This law is the only basis and the only source of international law. By going back to it, and by carefully studying it, we may succeed in retracing the rights of nations with accuracy. Every other way leads infallibly to error, to grave, nay deplorable error, since its immediate result is to blind nations and their rulers, to lead them to misunderstand their duties, to violate them, and, too often, to shed torrents of human blood in order to uphold unjust pretensions. The divine law is not written; it has never been formulated in any human language; it has never been promulgated by any legislator. In fact, it has never been possible, because such legislator being man, and belonging to a nation, was, from that very fact, without any authority over other nations, and had no power to dictate to them.

And a learned Dutch writer, von Martens, has spoken very much to the point. I am now reading from page 24. He says :

Investigating thus this spirit of law, we find the definition of international law to consist in certain rules of conduct, which reason, prompted by conscience, deduces as consonant to justice, with such limitations and modifications, as may be established by general consent, to meet the exigencies of the present state of society as existing among nations, and which modern civilized states regard as binding them, in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country.

And I remember, although I have not it cited here, the way in which the same question has been regarded bythe great English philosopher John Locke, illustrious all over the world.

In his treatise on Civil Government, he has occasion to consider what the law of nature is, and he defines it to be that law which men would observe and enforce upon each other if they lived in a state of nature and without any human Government whatever. In such a condition as that he says, and anterior to human Governments, men still enforced against each other a law. They could not appeal to any supreme authority to enforce it agains others, and the consequence was they enforced it themselves. They were their own executioners. If a man's rights, living in such a condition, were violated, he asserted his rights and defended himself by his own arm. Well that may be said to be only the employment of force and to be wholly divorced from right. But not quite so. A man who has justice on his side always has a supreme advantage; and, therefore, a man, if there is no supreme authority over him to which he can appeal for justice against his neighbour, may be permitted to enforce it himself and does enforce it himself. Well a very large part of that sort of enforamong men notwithstanding the societies into which they have entered. cement of justice still remains. The right of self defence rests upon me.

If I am attacked by a man I have a right to defend myself, and do.

If a man intrudes upon my properly I have a right by my own arm without appeal to any tribunal to thrust him off it, and do.

Those are the same means of enforcing justice and protecting rights which men would exercise if there were no Governments at all. Mr Locke then deals with the suggestion which he says will be made, that this state

of nature is an ideal thing which never has existed and never is likely to exist; and that question is idle in enquiring what rights men would have in a state of nature, or what methods they would have of enforcing them, if such a thing would exist; to which he makes the potent answer that all princes, kings, and sovereign States are now, ever have been, and always must be, living in a state of nature and have no other way of enforcing justice or determining rights than individuals would have if there were no Government over them.

These observations all tend to shew, and I think conclusively shew, that there is a law unwritten, which is everywhere in operation and which is perfectly sufficient to enable us to determine, in any given case, what the rights of nations are as between each other in respect to property, or in respect to any other relation which may be drawn in question, — a law which is perfectly supreme, and which, though not written upon Tables of Stone or promulgated from any Mountain, is nevertheless absolutely binding upon the conduct and the conscience of nations and all men. Now, when we look to the more particular sources from which we derive a knowledge of that law, they are these. First, the actual practice and usages of nations; and those are to be learnt from history in the modes in which the relations and intercourse of nations with one another are conducted, in the acts commonly done by them without objection from other nations; and in the Treaties which they make with each other, although these should be considered with some degree of caution, for these Treaties are sometimes exacted by a more powerful from a weaker nation, and do not always contain the elements of justice. And these practices and usages are also to be found in the diplomatic correspondence between nations, which assert principles upon one side, and which meet with acquiescence upon the other.

Another source, from which we may ascertain what the actual practice and usages of nations are, is from the judgments of those courts which profess to administer the law of nations, such as prize Tribunals, which are sometimes called International Tribunals, although they are not strictly such. When these sources fail to discover the rule by which we are to be bound, we look to the great source from which all law flows; that is to say, natural justices the dictates of right reason, or what is best termed, perhaps, the law of nature. And let me call attention to one most useful source to which we may look for ascertaining what the law of nature is, and which is not so commonly, I think, pointed out by writers, — I mean, to the Municipal Law. If we want to know what the law of nature is upon any given subject, the Municipal Law is a prime source of information; and it is so because Municipal Law is founded on the law of nature and has been cultivated, as I have endeavoured to point out, most assiduously for a thousand years by learned experts, named judges, in every civilized State. The efforts of such men, extending over such a long period of time in enquiring and determining what justice is in this case, and in that case, and in multitudes without number of

other cases, is, of course, a mode of cultivating the system of the law of nature. We know what rules are prescribed by the law of nature from the results of their enquiries; and, therefore, when any question of right arises similar to those questions of right which arise in Municipal jurisprudence, the Municipal jurisprudence of the several States of the world, so far, at least, as they are concurring, seems to me to be a prime source of knowledge; and, where there is concurrence, a conclusive source. And, finally, in all cases where are we to seek a knowledge of the dictates of the law of nature? — the authority of the jurists from Grotius, the great master of the science, down through succeeding writers to those of the present day — a very numerous body of very illustrious men given to ethical studies and to considerations of the great relation of independent States with each other. These constitute a source of information always respected by judicial tribunals in enquiries concerning the law of nature.

That, Mr President, closes what I have to say in reference to the law which is to govern the determination of the Tribunal. I am happy to believe that upon this branch of the controversy, at least, I am to anticipate no substantial disagreement from my learned friends on the other side. I think the subject hardly admits of a difference of opinion, and from what has already fallen from some of them I anticipate a concurrence.

**Sir Charles Russell.** — My friend must not assume that.

**Mr Carter.** — Then that may be considered as unsaid. I am apprised that there may be a difference in that respect, and I shall look with some degree of interest as to what those differences are, and the grounds upon which they may be based.

**The President.** — We shall finally perhaps get to a consideration of those immediate subjects which are to be submitted to this tribunal for its decision.

**Mr Carter.** — I now approach the consideration of that question which in the order which has been adopted by the Treaty seems properly to be the first to engage our attention. That has reference to the rights which may have been gained by Russia over the regions in connection with which this controversy has arisen, and the rights which consequently the United States may have derived from the act of cession of the Alaskan territory by Russia to the United States. When I was giving a historical sketch, as it were, of the origin of this controversy, I very briefly alluded to the region of Behring sea and to the early discoveries and acquisitions of Russia in that quarter of the globe. I ought, perhaps, to call attention to some of the details which it was not important for me then to give.

I have said that the maritime enterprise and ambition of Russia, withholding its exercise from the more fruitful and agreeable quarters of the globe, was exerted in these high northern latitudes on the coasts of Asia and North America, and where those coasts approach. The discoveries of Russian navigators in that quarter of the globe began at a very early

period. As early as 1648 a voyage was made from the Arctic Ocean from these northern shores of Siberia, around through Behring Straits and along the eastern coast of Siberia. That was as early as 1648, and I think that at about the same time there was a discovery of the North American continent near the mouth of the Yukon River, on the other side of Behring sea. That river does not appear to be laid down on this map.

**Mr Phelps.** — It is on the other map.

**Mr Carte.** — Yes; it is very plainly on the other map. I think in 1648; I may be in error as to that; I think so; the Russians discovered the shore at one place on the side, and that was near the mouth of the Yukon River (indicating on map).

**The President.** — Was not Siberia in possession of Russia?

**Mr Carter.** — So far as it could be in the possession of any power, I think it can be said that as early as that period it was in the possession of Russia. In the year 1728 Behring made his voyage through the straits to which his name was afterwards given. He made a second voyage in 1741, and in that voyage he discovered the eastern shore of the sea, and also a large number of the Aleutian islands. He discovered also the Commander islands, which are the breeding place of the Russian seals; and it was upon one of those islands that he was shipwrecked.

This discovery of the Commander islands by Russia gave them a knowledge of course of this wealth of fur-seals which visited that spot, and enabled then to turn that source of knowledge to the benefit of man. During this period and subsequent to the voyages which I have mentioned, there were other very numerous Russian voyages in Behring sea, and along the Aleutian chain, and in the course of them it was discovered that there were vast bodies of seals at certain periods of the year migrating north, and at certain periods migrating south. Their migrations north were more noticeable because it is in those migrations that they are more together; and from the knowledge the Russians had already acquired of the habits of seals on the Commander islands, they had every reason to believe that there was, north of the Aleutian Islands, through the passes of which they saw them taking their course, some remote region which they made their breeding ground. As I had occasion to state, the discovery of that unknown region was one of the great purposes of Pribilof, an enterprising Russian navigator, and he finally, after many attempts, made the discovery.

**The President.** — You mean to say Pribilof's expedition was mainly designed on account of the seals, that he at that period was looking out for the seals?

**Mr Carter.** — He was. After that discovery he had been looking out for the breeding place of those seals whom he had observed making these migrations to the northward. It was a distinct object with him, and he finally satisfied his ambition and made the discovery.

At a later period, Russian navigators also explored the region south of

the peninsula of Alaska, and down as far certainly as the 54th degree of latitude, and as the Russian authorities at the time claimed, down as far as the 51st degree of latitude; in other words, this coast here, which I call the Northwest coast, when I speak of the Northwest coast, without saying more, I mean that particular coast south of the 60th degree of north latitude, and extending down over the whole of the Russian possessions, and of British America.

Now a few words as to the characteristics of those regions. In the first place, one and all, they were absolutely incapable of agriculture. No such pursuit was possible upon them. In the next place, they were at that time almost uninhabited. Scattered tribes of natives, Esquimaux, were to be found nearly as high up as the Behring Straits; and I suppose also at other places farther south. Some of the Aleutian Islands were inhabited by natives races called Aleutians, and this more southern shore and islands were inhabited to a still greater extent by several different tribes of Indians. On the Siberian coast there were very few inhabitants, I mean in its more northern parts.

As there were no agricultural products, we may ask what other products were there. They were rich in one thing, and in only one thing, and that was fur-bearing animals. There were sea otters, seals, and many other animals, valuable for their skins and at this early period, we may say that was substantially the only product of these whole regions which were of any value to man. Subsequently, of course, fisheries were developed, but at that early period there was no product of these regions valuable to man except animals which were valuable on account of their skins.

How could this sole product of that region be gathered and turned to human purposes? Why, it was only by employing the instrumentality of natives who were from time to time engaged in the pursuit of these animals, and visiting them upon frequent, or upon stated, occasions for the purpose of taking such store of the skins as they had previously gathered, and giving to the natives by way of exchange and return such articles as they might be in need of. That was the only way in which the only products of these regions could be turned to human account; and that involved the necessity of having trading establishments at various points along the coast, and the furnishing of a certain number of vessels sufficient to carry the subjects of the commerce backwards and forwards. It required also the protecting arm of the Russian Government to defend these trading establishments which were thus established. Such establishments were principally established and the largest of them on the islands and shore of this Northwest Coast. There is where the most important of them were first established. There was at an early period at least one establishment as high to the northward as where the pointer rests now (indicating on map), and perhaps others along that coast; but as I now remember, I think not at that very early period. The Pribilof Islands were not inhabited for a very considerable time after their discovery.

They were uninhabited when found. The population which finally inhabited them was carried thither from some of the Aleutian Islands.

Let me, in the next place, remark that according to the ideas of that age and of that time, prior discovery gave to a nation the right and title to the unknown region which they had discovered. Ever since the discovery of Columbus had revealed to the European nations the existence of a new world, the ambitions of the different nations of the world, or of many of the different nations of the world, were greatly excited in turning these various discoveries to account. Of course there were likely to be, and there were, as we know from history very well, conflicting claims arising out of an asserted priority of right; and those conflicting claims were often the subject of discussion between different governments. It was necessary that some rule should be established by which priority of right should be determined; and the rule which came eventually to be established was the one which necessarily men would recognize if there was no other thing to give priority, and that was priority of discovery. That came to be universally recognized as a just foundation for a right. If, indeed, the prior discovery were subsequently abandoned, it might go for nothing; but, unless it was abandoned, if the discovery had been made, if an assertion of title had accompanied it, and an intention to appropriate the region —

**The President.** — And taking possession?

**Mr Carter.** — An intention to take possession. It was not necessary to take actual possession at first. That would not be possible in many cases; but if the intention existed to take actual possession, and that intention were carried out within a reasonable period, and not abandoned, the full and complete foundation of a right was laid.

How far did such a right extend? A nation discovers some part of the Atlantic Coast of the United States. Can it claim the whole Atlantic Coast upon the basis of that mere discovery? How great a strip of the coast does a discovery of one particular part of it entitle the nation which has made the discovery to claim? Then again : How far inland does the right thus founded upon prior discovery extend? That was another question. Could a nation that had seen and observed a particular point on the coast of a continent extend its title indefinitely to the interior and perhaps to the ocean on the other side of it? That was another question.

Those questions were never fully settled; but there was an approach to a settlement, and I think it was generally recognized that so much of a coast could be claimed by a discovering nation as it was in the power of that nation to fairly occupy.

So much for the coast. Then as to the interior. She was entitled to carry back her title into the interior as far as the rivers which emptied upon the coast to which she was entitled could be followed. That was a sort of general rule having some recommendations in point of reason, which was asserted and to a certain extent recognized by the nations of the time.

Of course the right of a nation in respect to the extent of territory which it could claim title to could not be limited to the mere point which it had discovered. Great Britain asserted that she had discovered the whole Atlantic coast of the North American continent, from Nova Scotia at the north, down to Florida, at the south. I leave out of view the controversy between Great Britain and Holland which affected that portion of the coast in which New-York is situated, and the title of Great Britain was finally vindicated to that. But she claimed, you may say, the whole Atlantic coast in virtue of the right of prior discovery. Had she many establishments upon that coast at an early period? No; not half a dozen of them. That whole space, an extent of 3,000 miles or more, was asserted by Great Britain to be hers in virtue of no other title than a right of first discovery, and an occupation in half a dozen different places along the coast.

Now, Russia, in making her discoveries of both shores of the Berhing sea, of the islands of the Berhing sea, and Northwest coast down to the 54th or 50th degree of north latitude, claimed and asserted a sovereign right and dominion to the whole of the territories thus discovered, founded upon her right of prior discovery. She followed up that assertion by the establishment of these trading posts, one or more of them, on the Alaskan shore of Berhing sea, several of them on the Northwest coast, south of the peninsula of Alaska, and more or less of them — I do not know how many — upon the Siberian coast. Her title therefore was based upon an undisputed prior discovery, and upon an undisputed occupation, so far as those few establishments could give an occupation of the whole region. Now, did they give a fair occupation of that whole region? That is a question which it is proper to consider here? Was this a reasonable assertion by her of dominion over that vast region? Could she fairly claim to exclude other nations of the globe from participation in the benefits of that discovery on the ground of her prior discovery, and the limited occupation which she had thus made of it? Was that a fair and reasonable claim? Possession of everything must of course correspond to the nature of the thing. If a nation had discovered some very fruitful part of the globe, the West Indies, for instance, the more southern part of the United States, and had attempted to lay a claim to a thousand miles of the coast, upon the mere basis of an occupation at one time. it might be deemed very unreasonable. Other nations might come in, and say :

You are not fairly improving the discovery you have made. Here is a coast capable of cultivation, capable of extensive settlements, capable supporting a numerous population, capable of producing a vast amount of product. You are not putting it to the uses and purposes for which nature intended it; you are leaving it in a wild and desolate condition; you are improving only a small portion of it; and yet you assume to shut out the rest of mankind from the benefits of it on the basis of that very small and limited occupation. That is not just or right, and you shall not be permitted to do it.

Assertions of that character were made at this time, and of course

the justice of them was quite apparent. How was it with this northern region? They have, as I have already said, but one product, and that was these fur-bearing animals. That one product was extremely limited, exhaustible in its character, and could be fully reaped and gathered by one nation. All that it was necessary to do to gather the product of this enormous region was to establish a few trading posts, which should be the centres of commercial establishments, and out from which there could go along the coast, from time to time, vessels to gather from the natives those stores of skins which they had collected. In that way the entire product of this whole region could be reaped easily by one power, and there was not enough for more than one.

**The President.** — If you please, we will rise here, and resume the hearing at 2 o'clock.

The Tribunal thereupon took a recess for an hour.

**Mr Carter.** — I was speaking, Mr President, at the time when the Tribunal rose for its recess, to the point of the nature of the occupation which it was necessary that a nation should take in order to make good the title found upon the first discovery of a new region; and I had said that the nature of that occupation must depend upon the nature of the thing to be occupied; and that while acts of occupation in one quarter of the globe might not be sufficient to make good a title but to a very limited portion, why in other quarters of the globe they might be sufficient to make good a title a very extensive region of the earth, depending upon the nature of the region itself. Now, I wish to apply those views to this Behring sea region, which was the great theatre of Russian discovery, and Russian enterprise, and to show that upon all the principles recognized in that age of discovery, her exclusive title to the whole, or nearly the whole, of this great region is very fully made out.

In the first place let me again bring to your attention here that the sole product of this region substantially was fur-bearing animals and other animals useful for their skins and that the gathering of that product was the sole benefit which mankind could derive from this quarter of the globe at that time. And next that there was enough only for one power — that one power was abundantly competent to reap the entire harvest. There was not enough for two. Several nations might indeed contend for the benefit of this trade in fur-bearing and other animals, but if they did, it would be only a losing business, it might result indeed to the disadvantage of Russia and render a trade, which otherwise might be profitable to her, a losing one. It would be of no advantage to other nations of the earth. It would be a losing one to them. They would make investments in it which would not be remunerative. It would, therefore, be best to those immediately concerned that the reaping of the entire harvest should be left to one. But it would, in the next place, be best in the interests of mankind, and that is the great consideration which we are to deal with here by leaving this monopoly, if you may choose to call it so, of the fur trade and of the trade in other

animals of that region to Russia alone. She trade would be regular; the world would be regularly furnished with the product of this region; it would be furnished with it at the smallest expenditure in money and in labour, and it would be furnished with it, therefore at the lowest price, and consequently all interests, those of rival nations and of the whole world itself would be best subserved by confining the product of this region to one power. It was very exhaustible, and wherever a product of nature is exhaustible, it is far best that the whole of it should be left to be exploited by one. Now acting upon these views, Russia made a perfectly good title according, to the views of that age, and upon principles which are entirely defensible. She established trading stations on the coast of Siberia, on the coast of Alaska, in Behring sea, and still others along this north-west coast. Along the north-west coast, it is true, indeed, that she met with the rivalry of other nations, and they made similar establishments along that coast, though not to so great an extent as Russia did, but north of the 60th degree of north latitude she had absolutely no rival at all. The whole of it, be it great or little, was left exclusively to her in the actual conduct of nations.

**Mr Justice Harlan.** — Do you mean 60° or 62°?

**Mr Carter.** — I say 60° in general terms. It is sometimes called the 61st degree. The line which separated the unquestionable part of Russian possessions from those which were questionable was sometimes styled the 60th or 61st degree of north latitude.

Now that was the title which Russia had assumed on the ground of prior discovery earlier than the year 1800. That occupation she had made earlier than the year 1800, as she had in her own view, and, I think, justly, done every act necessary to insure to her a complete and exclusive title to all the shores bordering upon the Behring sea and to all the islands in that sea, and to the Aleutian Islands which bounded it upon the southern side.

In 1799, acting upon the assumption that she had thus acquired an exclusive title, she made a grant of the exclusive privileges of that trade to a corporation created under her laws, and that is by what is called the ukase of 1799, or perhaps, more correctly, the charter of 1799, granted to the Russian-American Company. It will be found on page 14 of the first volume of the Appendix to the United States Case :

By the grace of a merciful God We, Paul the First, Emperor and Autocrat of all the Russias, etc., to the Russian American Company under our highest protection.

The benefits and advantages resulting to our empire from the hunting and trading carried on by our loyal subjects in the North eastern seas, and along the coasts of America, have attracted our imperial attention and consideration; therefore, having taken under our immediate protection a Company organized for the above named purpose of carrying on hunting and trading, we allow it to assume the appellation of "Russian American Company operating under our highest protection"; and for the purpose of aiding the Company in its enterprises, we allow the commanders of our land and sea forces to employ said forces in the Company's aid, if occasion requires it, while for further relief and assistance of said Company, and having examined their rules and regulations, we hereby declare it to be our highest impe-

rial will to grant to this Company, for a period of twenty years, the following rights and privileges : 1) by the right of discovery in past times by Russian navigators of the north eastern part of America, beginning from the fifty-fifth degree of north latitude and of the chain of islands extending from Kamchatka to the north to America, and southward to Japan, and by right of possession of the same by Russia, we most graciously permit the Company to have the use of all hunting grounds and establishments now existing on the north-eastern coast of America, from the above mentioned fifty-fifth degree to Behring strait, and also on the Aleutian, Kurile and other islands situated in the North eastern ocean.

2). To make new discoveries not only north of the fifty-fifth degree of north latitude, but farther to the south, and to occupy the new lands discovered as Russian possessions, according to prescribed rules, if they have not been previously occupied by, or been dependent on, any other nation.

3) To use and profit by everything which has been or shall be discovered in those localities, on the surface and in the interior of the earth without competition from others.

4). We most graciously permit this Company to establish settlements in future times, wherever they are wanted, according to its best knowledge and belief, and fortify them to insure the safety of the inhabitants, and to send ships to those shores with goods and hunters, without any obstacles on the part of the Government.

Those extracts from that ukase will be sufficient to convey an idea of the nature and extent of this grant by the Russian Government.

It was not a public act notified to all the other nations of the world, and the criticism is on this ground made by the learned Counsel for Great Britain in their Case that it was a concession only in favour of certain of their own subjects and was not lawful against other nations, and, therefore, no evidence of an exclusive right against other nations. But that seems to me not to be a correct view. It was on the face of it an assumption of property and complete dominion by Russia over the whole region. It was necessarily based upon that assumption. The Act would have no significance unless Russia had entertained the view that she was the sole proprietor against all other nations of that region and of these products and except upon that view it would have operated not in favour of Russian citizens, as it was designed to operate, but against them. If it was intended, as is suggested, that this should be a mere concession in favour of certain Russian subjects, and against all other Russian subjects, the only effect of it would be to preclude the great body of the people of Russia from the benefit of these enterprises in favour of other nations. It would relieve all other nations of the competition and rivalry of the great body of Russian subjects in that trade. Of course such could not have been its intention.

The design was, not to permit other nations to interfere with that trade, but to engross the whole of it for the benefit of Russia alone. That I think is very clearly the proper interpretation of that act. And it is to be observed, in the next place, that part of this design proceeded upon the notion that the products of these regions were few, limited, and exhaustible, and that, therefore, it was not wise that there should continue to be, even among Russian subjects, a disastrous competition for the purpose of reaping the benefits of those regions. A trade of this cha-

racter, limited in its nature, if engaged in by many Russian subjects, would be only a source of loss; and, therefore, the better way was to confine it to one proprietor, who would be perfectly able to exploit it and exploit it profitably. Those were the grounds upon which, as I conceive, this Charter of 1799 was based. In order to shew the views entertained by Russia at this time, I may read a quotation, which is contained on page 15 of our Counter Case, from a letter from the Russian American Company to the Russian Minister of Finance, under date of June the 12th 1824, as follows :

The exclusive right granted to the Company in the year 1799 imposed prohibition to trade in those regions, not only upon foreigners, but also upon Russian subjects not belonging to the Company. This prohibition was again affirmed and more clearly defined in the new privileges granted in the year 1821, and in the regulations concerning the limits of navigation.

Now, the next public Act of Russia in relation to these regions was the celebrated Ukase of 1821, which cuts such a figure in this controversy. This Ukase was of a different character in one particular. It purported to be levelled against other nations and to prohibit their interference in this trade. It will be found on page 16 of the first volume of the Appendix to the United States Case.

The Directing Senate maketh known unto all men. Whereas in an Edict of His Imperial Majesty issued to the Directing Senate on the 4th day of September, and signed by His Imperial Majesty's own hand, it us thus expressed : "Observing from Reports submitted to us that the trade of our subjects on the Aleutian islands and on the North West Coast of America appertaining unto Russia, is subjected, because of secret and illicit traffic, to oppression and impediments, and finding that the principal cause of these difficulties is the want of Rules establishing the boundaries for navigation along these Coasts and the order of naval communication as well in these places as on the whole of the eastern Coast of Siberia and the Kurile islands, We have deemed it necessary to determine these communications by specific regulations which are hereto attached. In forwarding these regulations to the Directing Senate, We command that the same be published for universal information and that the proper measures be taken to carry them into execution.

It is, therefore, decreed by the Directing Senate that His Imperial Majesty's Edict be published for the information of all men, and that the same be obeyed by all whom it may concern. The original is signed by the Directing Senate. Printed at St. Petersburg, in the Senate, 7th September, 1821 :

There are the Rules :

*Section* 1. The pursuits of commerce, whaling, and fishery and of all other industry on all islands, ports, and gulfs including the whole of the northwest coast of America, beginning from Behring's straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's straits to the South cape of the island of Urup, namely, to the 45°50' northern latitude, is exclusively granted to Russian subjects.

*Section* 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along whith the whole cargo.

*Section* 3. An exception to this rule is to be made in favour of vessels carried

thither by heavy gales or real want of provisions, and unable to make any other shore but such as belongs to Russia. In these cases they are obliged to produce convincing proofs of actual reason for such an exception. Ships of friendly governments merely on discoveries are likewise exempt from the foregoing rule (section 2). In this case, however, they must previously be provided with passports from the Russian Minister of the Navy.

*Section* 4. Foreign merchant ships which, for reasons stated in the foregoing rule, touch at any of the above-named coasts are obliged to endeavour to choose a place where Russians are settled, and to act as hereunder stated.

Then follow an elaborate series of rules designed to operate on foreign vessels, and rules designed to apply to cases where there are infractions of these prohibitions and where seizure and confiscation follow, providing how the confiscation shall be had and how the moneys arising from the confiscation be distributed.

**Sir Charles Russell.** — Section 14, I think, is important.

**Mr Carter.** — You think section 14 is important, — very well; section 14 is — " It is likewise interdicted to foreign ships to carry on any traffic or barter with the natives of the islands, and of the northwest coast of America, in the whole extent here above mentioned. A ship convicted of this trade shall be confiscated ".

Now here was an assertion of sovereignty over the whole shore on the Asiatic coast from Behring Straits down to the island of Urup, which is about where the boundary now is, the 47th degree of north latitude, and it extended on the American coast from Behring Sea down to the 51st degree of north latitude.

**Sir Richard Webster.** — From Behring Straits.

**Mr Carter.** — Yes, I mean from Behring Straits—from Behring Straits down to the 51st degree of north latitude — thus carrying Russian pretentions further south on the American coast than they were carried by the Charter of 1799 which limited them to 54°40'. The character, therefore, of that public act of Russia, as far as the shores were concerned was unmistakeable. It assumed absolutely an entire sovereignty over them, and, as I have already pointed out, it is perfectly well supported by her title which had been acquired and established over those regions upon principles just in themselves and entirely acceded to in that age of discovery.

What was the character of that assertion in respect of the sea, for that is the important question? Was it an assumption of dominion on the part of Russia over the whole of the Behring sea and of the North Pacific Ocean embraced within those boundaries? Did it assume — did it purport to be an assumption of dominion on the part of Russia of the whole of Behring sea and of the North Pacific Ocean along this line? I do not think that there is any evidence whatever that that was the nature or intention of it — none at all. An assumption of that sort would have been tantamount to an assumption by Russia that that vast extent of sea was her property and included within her territory, and therefore subject to her dominion as such. But there is nothing in this ukase of 1821 im-

porting that the intention of Russia was to make any such pretensions in the way of authority over the sea as that. She said this. The pursuits of commerce, whaling and fishery and of all other industry on all islands, ports and gulfs including the whole of the north-west of America, beginning from Behring straits to the 51° of northern latitude, also from the Aleutian islands to the east coast of Siberia as well as along the Kurile islands from Behring straits to the east end of the island of Urup, namely, to 45° 50' northern latitude is exclusively granted to Russian subjects. That was a grant of colonial trade to Russian subjects and of colonial trade alone. That is the grant, — the principal thing made, and that is all. That is what Russia, according to the ideas of that age, had a perfectly indisputable right to do. Nothing was more clearly admitted in that time than that every European nation — every nation, had a right to arrogate to itself the exclusive benefit of trade with its colonies, and to prohibit any other nation from engaging in such trade, and to take such measures as were necessary to enforce such an exclusion of other nations as that. That was perfectly clear. Now that grant Russia made. What did she do next? Assert any dominion over the seas, in the nature of sovereign dominion, I mean? Not at all. It is therefore, (that is in consequence of this grant, and for the purpose of protecting this grant,) prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than one hundred Italian miles, the transgressors vessel is subject to confiscation along with the whole cargo.

**Senator Morgan.** — That is not an obsolete doctrine now.

**Mr Carter.** — Of the right of a nation to assume to itself the right to its colonial trade?

**Senator Morgan.** — Yes.

**Mr Carter.** — No, not at all obsolete. It is an admitted doctrine, as much as ever, that every nation has a right to assert to itself the exclusive benefits of its colonial trade. Now all that Russia undertook to do upon the sea was to adopt a measure designed to protect the exclusive grant which it had made of its colonial trade; and I have next to observe that it adopted the measures which in that age were generally adopted for the purpose of carrying out such an object, namely, to interdict the approach of a foreign wessel within a certain line of the coast — interdict its approach.

Now, what was the reason of that? Well, the law, or the general rules of international law which limit the sovereignty of a nation to a strip of the sea, three miles in width, along its coast, was, I will not say, as well known and acknowledged in that age as it now is, but it was nearly so. It was perfectly familiar at that time, it was familiar to the statesman, to the jurist, to the legislators of the world; not, perhaps, so indisputably established as now, for the freedom of the seas was subject to more limitation at that date than now; but still, that was then a recognized doctrine. But, of course, the territ

rial limit of a nation could not be the limit beyond which it could not exercise any measure of prohibition for the purpose of protecting an interest which attached to the shore. It would not be possible at any time for a nation to preserve its own exclusive right to its colonial trade unless it was enabled to interdict the approach of foreign vessels from a much greater width of the sea than three miles.

If a foreign vessel was entitled to come within a distance, say of 4 miles from the coast, and then to come to an anchor and await a favorable moment for slipping in on the shore upon some particular point, the exclusive benefit of colonial trade could not be secured to a nation. In order to effectually prohibit it, a nation must be permitted to prohibit vessels from "hovering", as it was called.

**The President.** — Do you mean to say that confiscation could take place only within territorial waters?

**Mr Carter.** — No.

**The President.** — You say that the transgression could be punished, and the vessel seized, beyond territorial waters, within the 100 miles?

**Mr Carter.** — What I mean to say is this — that the offence which involved confiscation would be committed by the approach of vessels within 100 miles.

**The President.** — Could that offence be punished by confiscation and actual seizure beyond territorial waters?

**Mr Carter.** — I shall have occasion, presently, to say that the offence, if committed, could be punished by confiscation and seizure, not only beyond the 3 mile limit, but beyond the 100 mile limit.

**The President.** — That is your interpretation of the Treaty?

**Mr Carter.** — The Treaty is silent on that point, but it is one of the consequences of the prohibition, if the prohibition is valid. In order to show what measures were usually resorted to for the purpose of protecting colonial trade, and what measures were sanctioned, I may refer the learned Arbitrators to a decision of Chief Justice Marshall in the Supreme Court of the United States in the case of *Church v. Hubbard*. The Judgment is reported in the 2nd volume of Cranch's Reports, page 187. Chief Justice Marshall in that case says — "That the law of nations prohibits the exercise of any acts of authority over a vessel in the situation of the 'Aurora'" — that was the vessel concerned in that case — "And that this seizure is on that account a mere maritime trespass not within the exception, cannot be admitted". The "Aurora" was on the high seas at that time. This was a case, I might explain to the learned Arbitrators, upon a policy of marine insurance, and that policy of marine insurance contained a warranty that the vessel should not engage in prohibited trade. The vessel had been taken by a Spanish cruiser as having been engaged in a trade prohibited by the law of Spain, and she was captured far outside the 3 mile limit for an offence of being within a limit much narrower than the one within which she was captured.

**Mr Justice Harlan.** — In time of peace or war?

**Mr Carter.** — In time of peace.

**The President.** — The offence had been committed within the limits?

**Mr Carter.** — The law of Spain contained a prohibition against vessels coming within a certain limit. This vessel had, it was alleged, come within that limit.

**Senator Morgan.** — What was the limit?

**Mr Carter.** — I do not remember the extent of it.

**Senator Morgan.** — More than three miles?

**Mr Carter.** — More than three miles, much more than three miles. The vessel had, as was alleged, committed an offence against that law of Spain designed to protect her trade, and, having committed that offence, a Spanish cruiser seized her far out at sea, and the Insurance Company set that up as a defence against their liability on the policy. The argument on the part of the Plaintiff in the suit, seeking to recover on a marine policy, was, that she was not engaged in a prohibited trade, and that if she was, she could not be captured by a Spanish cruiser out at sea in the manner in which she was, and that no nation had an authority to say that a vessel should not come within a certain distance from the shore greater than the ordinary territorial limit of three miles.

Chief Justice Marshall says :

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere maritime trespass not within the exception, cannot be admitted. To reason from the extent of the protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel.

But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy. So, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to. In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the Government will be assented to. Thus in the Channel — " (that is the British Channel) " — where a very great part of the commerce to and from all the world of Europe passes through a very narrow sea the seizure of vessels on suspicion of attempting an illicit trade must necessarely be restricted to very narrow limits; but on the coast of south America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in thems elves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions. If this

right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests which have sometimes ended in open war. The English it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the Guarda Costas of that nation seized vessels not in the neighbourhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries.

Indeed, the right given to our own revenue cutters to visit vessels four leagues from our coasts is a declaration that in the opinion of the American Government no such principle as that contended for has a real existence.

**Mr Justice Harlan.** — Mr Carter, my brother Arbitrator asks me what is the date of that decision?

**Mr Carter.** — The date does not appear here; but, from the period, I should say 1804 or 1805.

**Mr Phelps.** — The extract from the case is printed at page 181 of our printed argument.

**Sir Charles Russell.** — But the date does not appear.

**The President.** — I should like to ask whether it is your contention that these principles are still prevailing in actual modern internationallaw?

**Mr Carter.** — Undoubtedly.

**The President.** — That is your contention?

**Mr Carter.** — That is our contention, — not only our contention, but we suppose there can be no sort of dispute on that point.

**The Président.** — It may be open to observations on the other side.

**Mr Carter.** — It may be open to observations on the other side; but when the other side come to make their observations upon that point, they will have to upset the opinion of Lord Chief Justice Cockburn of Great Britain. But in the celebrated case of *Regina V. Keyn* not very long ago decided, and which engaged the attention of a large number of the learned judges of England, this very passage that I have read from the opinion of Chief Justice Marshall was quoted, and quoted with entire approbation by Lord Chief Justice Cockburn.

**The President.** — Certainly it is an important authority at any rate.

**Mr Carter.** — Now what was the character of this assertion of authority by Russia of general dominion over the seas? — An extension of her territory over the whole of Behring sea and parts of the Pacific ocean? — Of a right against foreign nations in respect of those seas? — Of a right to exclude foreign nations from those seas? — A right to assert in respect of Behring sea, and a part of the Pacific ocean, of the old and supposed to be exploded doctrine of *mare clausum?* — Was that the nature of the contention set out? — Not at all; it is not open to that interpretation at all. It was a grant to a private company of the exclusive privilege of colonial trade, to which Russia had an indisputable title, and it was the adoption of a preventive and protecting regulation designed to prohibit any interference with that trade by other nations which she had an equal right to adopt. It is apparent on the face of it. Is says, " We therefore

interdict all vessels from approaching the coast within 100 miles " Why? — because we have made this grant, and for the purpose of protecting that grant. Now that interdiction of 100 Italian miles may have been reasonable or unreasonable — that is another question; but the principle upon which it was made — the doctrine upon which it was founded is justified not only by the practice of nations, but by every just rule of international law; and it stands as good to-day as it was in that time.

I have said it may have been unreasonable. Let me say now that it was in the highest degree reasonable although that is not important here. You will remember the observation of Chief Justice Marshall in the citation I have just read from his opinion, which was to the effect that an exclusion of the vessels of a nation on a frequented coast which was the general pathway of commerce — an exclusion of foreign vessels to a great extent of the coast, would he unreasonable and would not he submitted to by other nations — it would interfere with their commerce too much. But in the case of a distant and remote sea where there was little commerce, and where the purposes of vessels in entering the sea would be at once observable, why a larger exclusion might well enough be justified.

Now applying those very reasonable views to the present case, for what purpose could a vessel entering Behring sea in the year 1821, other than a Russian, have? Whaling was, at that time, very little, if at all, practised. It is possible that a ship might go up there for the purposes of whaling, but it was very little practised. The probabilities were, if any vessel were found in those seas, it was for the purpose of engaging in this trade connected with the shores there; and therefore the probability was that she was attempting to engage in an illicit trade in which she had no right to participate. The very circumstance that she was in that region whether 100 or 200 miles from land, was a suspicious circumstance and justified her being treated as engaged in a suspicious and illicit business.

**The President.** — Do you mean to say that if the ship had been engaged in whaling that would have been the same case? — That that would have been what is called " illicit ", according to the Russian grant?

**Mr Carter.** — It would have applied undoubtedly to a vessel if her object had been whaling; and yet, if her object had been whaling, it would not have been an unlawful object on general principles ; that is on the assumption I have gone upon — that it was not the purpose of Russia in this Edict, or the effect of that Edict to assume general dominion over the seas. A whaling vessel might be in Behring sea for the purpose of whaling and might be within 100 miles of the shore without necessarily subjecting herself to an unjust suspicion of being engaged in an illicit trade; but it must be remembered that whaling was substantially unknown at that time, and therefore there was not likely to arise any contingency of that sort.

There is another instance in which vessels might be caught in Behring Sea.

**The President.** — Whaling is the first thing mentioned in that Article I as a consequence of the grant — the rules established.

**Sir Charles Russell.** — And fishing.

**The President.** — Do you make a difference between whaling and fishing according to the text of this grant?

**Mr Carter.** — No, I make no difference.

**The President.** — Whether a ship is engaged in whaling which is pointed out as un authorized.

**Mr Carter.** — The grant is that these pursuits are forbidden all along these coasts. Nothing is forbidden there except what is or may be done on the coasts. I think the fair interpretation of that grant does not include whaling in the open sea. I do not think it is intended to include that.

**Mr Phelps.** — They never attempted to enforce it.

**Mr Carter.** — No, they never attempted to enforce it.

**Sir Charles Russell.** — That is another matter.

**The President.** — The fishing in the open sea would be interdicted.

**Mr Carter.** — No, I think not. I think the interdict is confined to what is done on the coast.

**The President.** — Within the 100 miles.

**Mr Carter.** — No, I do not say that. It does not say it is interdicted. It says. — " The pursuits of commerce, whaling and fishery : and of all other industry on all islands, ports, and gulfs including the whole of the north-west coast of America, beginning from Behring's straits to the 51° of northern latitude, from the Aleutian Islands to the eastern coast of Siberia as well as along the Kurile islands from Behring's straits to the south cape of the island of Urup, namely, to the 45° 50' northern latitude is exclusively granted to Russian subjects : There is the grant : — " The pursuits of commerce whaling, and fishery and of all other industries on islands, ports, and gulfs. "

**The President.** — The transgression is only when the whaling or fishing takes place along the coasts or on the coast ?

**Mr Carter.** — On the coasts.

**The President.** — The 100 mile limit is for the whole thing — as being suspicious.

**Mr Carter.** — The imposition of the 100 mile limit is for the purpose of preventing infraction.

**The President.** — But the infraction is not committed within the 100 miles, — they must come to the coast themselves.

**Mr Carter.** — Yes, then the mere going within 100 miles would be an infraction of that prohibition.

**The President.** — Whatever the reason be?

**Mr Carter.** — Yes, but you must separate the grant, from the measure of protection which was contrived for the purpose of securing the grant. Those are the two things. The grant is one thing ; the measure of protection is another; now the measure of protection is violated the moment

a vessel enters the 100 mile area whatever she may be engaged in — it is not necessary then to carry on that pursuit, — her mere presence there is a violation.

Now, I have said that upon the face of this Ukase it does not purport to assume dominion over any part of the sea, — it purports only to establish a defensive, — a self-protecting regulation which is to operate over 100 miles of the sea; a self-protecting regulation which is to operate over so many miles of the sea. And let me say here (as it appears to be exciting the interest of the Arbitrators on this point), that such things were extremely common, and are common to the present day. For instance, every nation has its Customs laws, and, of course there are universally carried on, to a greater or lesser extent, operations designed to evade those laws, — smuggling, for instance and one great instrumentality by which smuggling is carried out is for a vessel, having a cargo on board which she wishes to land without paying duty, to come and hover off the coast of a nation, and wait until some vessel, acting in concert with her, comes out and transships her cargo at sea. That is a common method carried on in smuggling operations. Now, of course, a nation must have the privilege of preventing that in some way; and if she were limited to excluding intended smuggling from only that space of waters which is expressed within the 3 mile limit, she would be almost defenceless against it. If a vessel intending to carry on smuggling operations is permitted to come within sight of a shore, where she can be perceived from the shore, why, she would be able to carry out her illicit intent. Therefore, nations must have some method of preventing vessels coming within sight of the shore.

**Senator Morgan.** — Is your present argument addressed to the first and second points of the 6th article of the Treaty?

**Mr Carter.** — Well it is not addressed particularly to any article of the Treaty, but my point is confined to an explanation of the real nature of this prohibition contained in the Russian ukase of 1821.

**Senator Morgan.** — But the first article of that Treaty, as I understand it.

**Mr Carter.** — Are you asking me with regard to the Russian Treaty?

**Senator Morgan.** — No the printed Treaty between the United States and Great Britain. The first article, as I understand it, does not require the Arbitrators to pass judgment on the rightfulness of the Regulation, but merely upon its assertion and exercise on the part of Russia.

**Mr Carter.** — Yes, I know it does, but it is a part of the general discussion involved here — not only its actual exercise, but also its rightfulness.

It is not important for us to maintain its rightfulness in the slightest degree. It is not important at all; but still it is a fair part of the discussion on this question to say that not only was Russia endeavouring to meet this assertion of authority and maintain it, but that the assertion was a rightful one according to the principles of that day. Now for the purpose

of showing that, let me illustrate it by referring to what are called "Hovering Laws", which are on the statute books of Great Britain, and the United States, and France as well, and other nations, most likely, in relation to smuggling.

They prohibit a vessel from hovering on the coast within a space of four leagues — twelve miles. They prohibit foreign vessels or any vessel, foreign or other, from hovering there, and the penalty for hovering within those four leagues is capture and confiscation.

So also there are quarantine laws which under certain circumstances require vessels at certain times to come to at a very great distance from the shore — much further out than three miles — and await a boarding vessel there, and the penalty for a violation of such exactments is always capture and confiscation. So that this instance of an assertion of an authority by Russia operative over a great distance of the sea beyond the limit of three miles is not an exceptional exercise of authority but one commonly resorted to — always resorted-to when there was the necessity for a defensive and protective measure of that character.

Without going any further into that discussion at this time, but only for the purpose of showing that such was its nature, what I have just said goes to show that that is the nature of this regulation upon the face of it.

I have now to point out to the learned Arbitrators that that was the view taken of it by Russia at the time when it was protested against. It was protested against by Mr John Quincy Adams, then Secretary of State of the United States, and this was the explanation given by the Russian Government. I read from the Note of M. de Poletica, page 133 of the first volume of my Appendix.

> The American Government doubtless recollects that the irregular conduct of these adventurers, the majority of whom was composed of American citizens, has been the object of the most pressing remonstrances on the part of Russia to the Federal Government from the time that diplomatic missions were organized between the countries. These remonstrances, repeated at different times, remain constantly without effect, and the inconveniences to which they ought to bring a remedy continue to increase. Pacific means not having brought any alleviation to the just grievances of the Russian American Company against foreign navigators in the waters which environ their establishments on the north-west coast of America, the Imperial Government saw itself under the necessity of having recourse to means of coercion, and of measuring the rigour according to the inveterate character of the evil to which it wished to put a stop. I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean, extend on the northwest coast of America, fro ı Behring's strait to the fifty-first degree of north latitude, and on the opposite side of Asia and the islands adjacent, from the same strait to the forty-fifth degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to shut seas (*mers fermées*) and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.

I ought to have read the first paragraph of that, which says this :

I shall be more succinct, Sir, in the exposition of the motives which determined the Imperial Government to prohibit foreign vessels from approaching the north-west coast of America belonging to Russia within a distance of at least 100 Italian miles. This measure, however severe it may at first appear is, after all, but a measure of prevention. It is exclusively directed against the culpable enterprises of foreign adventurers, who, not content with exercising upon the coasts above mentioned an illicit trade very prejudicial to the rights reserved entirely to the Russian American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established.

So we have not only the fair interpretation of the Ukase itself, but the express declaration of the Russian Government that this prohibition of the entering of foreign vessels within 100 miles of the shores, along this whole coast, was not designed as an assertion of sovereignty at all, but only to defend the colonial trade of Russia against illicit invasions of it by foreigners. And Mr Middleton, the American Minister at Saint-Petersburg at that time, addressed a note to Mr Adams in which he says this is the purpose which the Russian Government had in view in making the declaration of this Ukase. I will read an extract from a letter of Mr Middleton to Mr Adams, which is found at page 135 of the first volume of our Appendix. The particular passage to which I refer is very nearly at the top of page 136. It says :

To Mr Speransky, Governor General of Siberia, who had been one of the committel originating this measure I stated my objection at length. He informed me that the first intention had been (as Mr Poletica afterwards wrote you) to declare the Northern portion of the Pacific Ocean as *mare clausum*, but that idea being abandoned, probably on account of extravagance, they determined to adopt the more moderate measure of establishing limits to the maritime jurisdiction on their coasts, such as should secure to the Russian American Fur Company the monopoly of the very lucrative traffic they carry on.

**The President.** — Is there any evidence from the north that the Russian Government at any time previous to this correspondence had asserted the rights of *mare clausum* — the rights of sovereignty over Behring sea?

**Mr Carter.** — None whatever.

**The President** . — No evidence of that sort?

**Mr Carter.** — No evidence of that sort, neither before nor since in my view, unless this constitutes an assertion of the law of sovereignty which I do not think it does.

**The President.** — That is a position they might have asserted. They said they might have asserted it but at the same time they said they did not assert it.

**Mr Carter.** — Yes, they suggested they had the right to assert it but at the same time they protested that they had not asserted it in fact.

Now, having described this ukase of 1821 and the nature of it, such as it appears to be from a fair interpretation on the face of it, with the declarations the Russian Government have made in reference to it, I next proceed to call the attention of the Arbitrators to the notice which was taken

of it by the American and the British Governments. But the particular subject of the Protests I shall postpone for a few moments for the purpose of dealing more particularly with the question of the rights of Russia in or over Behring sea and its shores, what they were, and the place which they fill in our argument here, and the place which they fill in the questions which are submitted to the Tribunal. I will postpone the particular consideration of the Protests of Great Britain and the United States until I have made some observations on the general subject of this Russian jurisdiction.

We see now what the claims of Russia were by this ukase of 1821, and that it was an assertion not of the right of sovereignty, but of a right to establish a protective regulation, operative indeed at a greater distance than 3 miles from the shore. I have in the course of pointing that out somewhat briefly alluded to a distinction between the exercise of full and sovereign dominion by a nation over a sea or over lands, as far as it goes, and the exercise of a self-protecting power, such as a defensive regulation of this sort is. I want to follow up those observations a little further for the purpose of fixing in the minds of the Arbitrators the real nature of these two different things and of their essential difference.

Now, what is full dominion or sovereignty such as is exercised by a nation? What is it? Well, the full right of sovereignty includes, of course, a full right of property over all the territory to which that sovereignty extends, — a full right of property; and when I say a full right of property, I mean of absolute right in the territory over which it extends. That is included in the notion of sovereignty.

**The President.** — You do not mean property in the civil sense?

**Mr Carter.** — I do mean property in the civil sense.

**Sir Charles Russell.** — Surely there might be private property in a territory over which there is sovereignty?

**Mr Carter.** — I mean property in the civil sense; but I ought perhaps to explain this. Take this territory of France on which we stand. Well, I suppose that really is Government property. But take the private property in the land in any particular country. Writers on the laws of countries separate the property interest into two parts, one of them they call the *dominium utile*, and the other the *dominium eminens*. The *dominium utile* is the right to use and enjoy; and it is that and that only which is vested in private individuals. The rest, — the *dominium eminens*, which means the absolute property, and by an exercise of which a nation can at any time displace the individual right — that *dominium eminens* is vested in the sovereign power alone, — in the Government; and it is that sovereign right of property which I mean when I say that sovereignty embraces the full property in the territory over which it extends.

In the next place, it embraces the right of legislation over the whole territory, — the right of legislation in respect of persons and things, and, consequently, the power of excluding any foreign nation or its citizens from any part of the domain which it covers. It embraces the full

right of Government, and that is necessarily exclusive of every other Government. Of course, no other Government can make a single regulation which has any binding force upon the territory of a foreign Power.

Now, this right of sovereignty, embracing property and the right of legislation both, is necessarily limited by a rigid boundary line. That is one character of sovereignty. It must be limited by a rigid boundary line. The property cannot be held unless it is specified and described; and, of course, the laws of a Government must be absolutely known,—the limits of them must be absolutely and precisely known; they cannot shift and vary according to circumstances. It is, therefore, the characteristic of this full sovereignty, which a nation possesses over its territory, that it is limited rigidly by a boundary line, and that right of sovereignty is possessed by the Nation as a Government, as an organised community, engaged in the business of administering the laws and welfare of the territory over which it extends.

Now, there is another class of rights which a nation may enjoy, and does enjoy, not thus rigidly limited by a boundary line, but which it may exercise wherever it goes in its capacity as an individual.

First, let me mention the great right of self-defence. That accompanies a nation wherever it goes, and it may be exercised by a nation not because it is a government, but because it is an individual. It exercises this right of self-defence much as an individual exercises it. Each one of us has a right of self-defence, not because we have any governmental power, but because we are persons who have rights, and that is one of them; and just so it is with nations. Wherever they have a right to be, there they can exercise those powers which are necessary to protect themselves as persons. And, in addition to protecting themselves as persons, they may protect themselves as property — nations being incorporate persons — I mean not natural persons — can scarcely be touched outside the limits of their territory, except in the way of touching their property; and I say those rights of self-protection may be exercised by a nation wherever the nation has a right to be; and a nation has a right to be anywhere upon the high seas. A nation goes wherever its property goes, from one end of the world to another, and it exists as a nation until it reaches the boundaries of some other nation. It cannot pass those, but on the high seas all the nations of the world exist together. Their citizens go upon those seas; their commerce goes upon those seas; and wherever their citizens are, and their commerce goes, there the nation goes; there its power goes as an individual; there, if its property is attacked, or its citizens are attacked, it has a right to defend them. It is the great right of self-defence. And it has a right to use just such means, methods, and weapons, as are necessary fully and perfectly to protect itself. That is not because it is a government, but because it is an individual, and has a right to be on the great high way of nations, and to go there with its interests; and if it could not protect its interests, why, how in the world could they be protected at all?

Take the case of a fleet of American Merchantmen which might be convoyed by American men of war. Suppose it is attacked somewhere on the high sea, cannot it defend itself? What are the men of war convoying them for except for the purpose of defence? Of course it can defend itself. And wherever its property is, if that property is in any manner assailed, it must protect it. Commerce could not otherwise exist. The intercourse of nations could not subsist except upon these principles. Let it be supposed that the citizens of some foreign nation should commit a trespass on the property of the United States some where upon the seas, and those persons should make complaints to their own Government and their Government should go to the nation to which the trespassers belong and complain and say that the citizens of your nation have been injuring the citizens of ours in respect to their property on the high seas, we ask you to make redress. What would they say? Would not the answer be, cannot you protect your own citizens? Have you not just as much power to protect your citizens upon the high seas as we have? If a trespass was attempted against them why did they not resist and beat off the trespassers, and if they were not able to do that why then they must resort to Courts of any nation in the world to obtain their redress.

But these principles do not rest on any theoretic statement. They have been universally admitted in the practice of nations, and it is absolutely true, there is no sort of qualification to the proposition, that wherever a nation has found it necessary to exert acts of force upon the high seas, in order to protect its own rights or rights of its own citizens, it has the right to exert such acts of force.

There are many illustrations of it. Many of them arise, if not most of them, because that is where the occasion mostly arises, under belligerent conditions. Suppose a war has broken out between Great Britain and the United States, for instance, and a port in the United States is blockaded and a British vessel finds a vessel belonging to France attempting to enter that blockaded, port. What does she do? Why, captures her, and carries her in for confiscation. Why? Here is a vessel, a French vessel, friendly to both powers, not designing to injure either of them, engaged in peaceful commerce, not aiding or assisting the belligerents; and yet when she attempts to enter the port of one of them, of whom she is a friend, the other, of whom she is also a friend, takes her and captures her.

How is that to be defended? Why, it is defended on the ground of necessity. Great Britain says :

> I am carrying on a war with the United States, and I am endeavoring to subdue the United States, and compel her to come to a peace with me. I have a right to reduce her to an extremity if I can; and here you are carrying her provisions, and what not. That prolongs the war, and, therefore, prevents me subduing my enemy, which I have a right to do, and I therefore take your vessel and capture her on the high seas.

Take again, the case of contraband of war. It is the same-thing.

A vessel is found on the high seas, not about to enter any port, but bound to a belligerent port, having on board contraband of war. What is done? She is taken and captured. Why? Because she is attempting to assist an enemy; that is, she is doing acts which amount to assistance, and rendering, therefore, the operation of one of the belligerent parties less effective. It is admitted in international law that when two nations are at war their rights are supreme over other nations, and they have a right to assert those rights on the high seas, because they are necessary for self-defence, and self-protection. I am speaking here of belligerent conditions.

Let me now pass to other conditions, peaceful conditions, some of those to which I have already alluded, — the defence of colonial Trade. The territory of a nation does not extend but 3 miles beyond its coast; we all know that; and a nation cannot extend its system of laws beyond that 3 miles. We also know that. But, nevertheless, it has a right, as a person has a right, to exert the authority and the power of self defence against threatened invasion of its interests by other persons; and it, therefore, has a right to do acts which are necessary for that purpose; and the line up to which it may exercise its authority is not a boundary line upon the earths' surface, but it is a line limited by necessity, and by necessity alone. The right is created by necessity, and, of course, has no other limit than the necessity which creates it.

The same is the case with respect to the municipal laws of various nations designed to prevent smuggling. They are in force the whole world over, and have been in force for centuries and ought to be. They purport to be municipal regulations and municipal laws; and they are municipal laws in every sense of the word.

The hovering Statutes of Great Britain, forbidding a vessel to hover within 4 leagues of her coast, are binding upon her own citizens because they are laws. Are they binding upon other nations because they are laws? No. They are binding upon other nations because they are defensible acts of force which she has a right to exert. She would have a right to exert them even if the laws had not been passed. If Great Britain had no hovering law upon her Statute-book, she would have a right to give instructions to her cruisers to prevent vessels hovering on her coast that were calculated to excite the suspicion that they were engaged in smuggling; and, if other Powers complained of that, the only question would be whether it was reasonable or not. Great Britain, having a constitutional Government, cannot very well capture vessels on the high seas and libel them, and carry them in for condemnation without a system of municipal law providing for it. Neither can the United States. Therefore, in such countries, it is necessary to have municipal law for the purpose of governing the seizing of vessels in the exercise of their jurisdiction, and also governing their proceedings in case of condemnation. They are all prescribed by municipal law.

These municipal laws are perfectly valid and binding, and valid and

binding as laws upon the citizens of Great Britain, and valid and binding upon the citizens of other States, not as laws but because they are reasonable for the exertion of a self defensive power.

The circumstance that they are enacted into laws does not of course take away from them their validity. It only serves to render them more reasonable because it subjects foreign citizens only to the same rule to which citizens of the country are themselves subjected.

Quarantine Regulations are of the same character. A nation must have the right to protect itself against the entrance of contagious diseases. No people in the world on the ground that the seas are free has a right to bring diseases into dangerous proximity to the coasts of another nation and if for the purpose of keeping infection clear from the coasts it was necessary to keep vessels 100 miles off the coasts why, the right to do it would exist.

There is no such thing as universal rules in international law or in respect to the freedom of the seas, as there are no universal rules in respect to anything. Everything in the world depends upon circumstances.

Whatever right, whatever acts of power it is necessary for a nation to assert upon the high seas in order to protect its own essential interests, if they are fair, if they are moderate, if they are reasonable, if they are suited to the exigencies of the case, if they do not transcend the necessity which creates them, they are valid, and all other nations in the world are bound to respect them.

**The President.** — If I understand you aright, your contention would be that action of nations on the high seas is founded on the same principles in time of war as in time of peace?

**Mr Carter.** — Precisely. My position cannot be better stated than that. What gives these extraordinary rights to nations in times of war is necessity — the necessity of self-defence. The same necessity can arise in times of peace just as well, and whenever it does arise it demands the same remedies, and the same remedies are applied.

**The President.** — Would you like to rest awhile, Mr Carter?

**Mr. Carter.** — No, I am not at all tired.

**The President.** — The manner in which you express your views interests us very highly.

**Mr Carter.** — I thank you.

Now, this right of self-defence which I assert and which is so entirely different from the right of sovereign jurisdiction, does not militate at all with the freedom of the seas. It asserts the freedom of the seas. It is exceptional in its character. It asserts the general rule of the freedom, of the seas, but says notwithstanding that freedom, there are instances in which all nations are subjected to certain necessities and those necessities beget and create the authority to use reasonable measures of defence and protection. All reasonable nations will accede to them and do accede to them, and consequently they have had their place in all

time on the statute books of nations and have never led to contention except in cases where they were really unreasonable or supposed to be so.

**Senator Morgan.** — Mr Carter, I believe that you have not as yet read that part of the correspondence between the two Government, relating to the question of an assumption of damages in this treaty for trespasses alleged to have been committed against the Government of the United States.

**Mr Carter.** — No; I have not.

**Senator Morgan.** — I wanted to ask you if in the correspondence that led up to this treaty, Great Britain did not refuse to admit her liability for any trespasses by her nationals upon the property of the United States?

**Mr Carter.** — Well, perhaps she did.

**Sir Charles Russell.** — Certainly she did.

**Senator Morgan.** — She did refuse?

**Sir Charles Russell.** — Certainly.

**Senator Morgan.** — And that was the reason why a claim for damages on the part of the United States was excluded from this treaty.

**Mr Carter.** — At a later stage in my argument I shall deal with that matter; but it does not seem to me to be especially relevant here.

**Senator Morgan.** — It seems to my mind to be exactly in point, if you will allow me. Therefore, I ask the question; If Great Britain refuse such responsibility for trespasses by her nationals on the high seas, must it not follow if the United Sates were the owners of this property, and if Great Britain has refused to become responsible for the trespass by her subjects or nationals that the United States may prevent the trespass and the consequent damage which they would otherwise suffer.

**Mr Carter.** — In my humble judgment the United States has the power to prevent the trespass and the consequent damage whether Great Britain is willing to answer for the damages or not.

**Senator Morgan.** — In this case I am trying to get at the history of it. That matter has been under discussion and Great Britain has refused to become responsible for the trespasses of her nationals.

Sir Charles Russell. — She denied that there was any trespass upon the property of the United States.

**Senator Morgan.** — I understand that. My question is predicated upon the supposition that there was a trespass. It was the property of the United States, and if there was a trespass, has not Great Britain in this very negotiation refused to be come responsible and excluded it from this treaty on that account. That is the point I wanted to get at.

**Mr Carter.** — I believe that to have been the case.

**Senator Morgan.** — I think that is pertinent.

**Mr Carter.** — In my view it is not among those things which in my mind are pertinent to the present discussion; and of course I cannot very well argue myself, except by employing those grounds and reasons which in my mind seem to be material.

**Senator Morgan.** — I was only claiming the right to have the difficulty in my mind cleared up.

**The President.** — Perhaps the Counsel on either side will clear the matter up later on.

**Senator Morgan.** — I trust I am not too early with the suggestion because it is an important matter in the case, and I shall expect to hear argument upon it on both sides.

**Mr Carter.** — I will give to that question the attention which from the interrogatory of the learned arbitrator it seems to deserve.

I have said that this position which I am seeking to maintain of the right to self-protection, as distinguished from any assertion of sovereignty, is not in conflict with the ordinary doctrine of the freedom of the seas in any particular. It admits that doctrine, stands upon it, and asserts it only as exceptional, justifiable in cases of necessity; and then justifiable only up to the extent of that necessity. But in respect to the freedom of the seas, the position which we maintain, does assert one thing, however, with positiveness. That is, that however free the seas may be in the just sense of the word they are not free anywhere in any quarter of the globe, at any distance from the shore — three miles or three hundred miles — to the commission of wrong, and whether a thing is wrong or not when committed on the high seas is just as easily determinable as it would be if the dominion of some municipal power extended over it. In other words, our position is that there is no part of the globe, on the sea or on the land, that is not under the dominion of law, and under the dominion of a law which the courts of every nation will take notice of, even the municipal tribunals, and under the dominion of a law which this tribunal as an international one, will particularly take notice of.

I have been thus explicit upon this subject, and have devoted to it the attention which I have devoted for the reason that I think there has been a considerable contention upon it. There is a contention in relation to it in the opinion of writers upon international law. They have not as a general rule pointed out these two distinct and different species of authority which a nation may exercise. They have not clearly defined them. They have not placed upon them the limitations which clearly attach to them.

There is a contention about them in the discussion of diplomatists. There is a good deal of confusion on those two subjects in the diplomatic communications between Great Britain and America in respect to the subjects of this controversy. That confusion has found its way into the terms of the treaty itself and will be found in the submission of the questions which are submitted to this Tribunal. And let me say that that confusion has arisen to a very considerable extent from the use of an ambiguous word — " jurisdiction " — to characterize and define both things. Both these species of authority are spoken of by jurists, by lawyers in text books, and elsewhere under the general name of jurisdiction, and thus that word has become one of ambiguous import.

The word " jurisdiction " has sometimes been used when we speak of the jurisdiction of a nation in a certain narrow and rigid sense as describing the sovereign right of legislation; that is to say as describing that authority the exercise of which is necessarily limited by a boundary line. It has been used sometimes in that narrow sense and at other times it has been used to describe any act of authority which a nation might commit, whether within that line or outside of it. A similar ambiguity is found in the use of the word " jurisdiction " in relation to matters of municipal law. We sometimes speak of a court having jurisdiction in a particular controversy. That means that it has a jurisdiction to enquire into the merits of the controversy and to dispose of those merits by a definitive judgment. It means that generally; but we sometimes say also that a court has jurisdiction to do a certain thing, meaning by it that it has the power to do a certain thing. We sometimes speak of the jurisdiction of a municipal officer merely to describe the power of the officer. We say that a taxing officer has the jurisdiction to assess certain persons for taxation. We mean by it that he has the power to do it, and that is all we mean. Jurisdiction has no proper application to such an authority as that; and it is from this ambiguous use of this word that much of the doubt and difficulty respecting the subject has arisen.

Now what has been the claim of the United States in the course of this controversy in respect to the nature of the authority acquired by Russia in Behring sea, and of the rights which Russia had gained in that sea, and the rights the United States has consequently gained by the acquisition of Alaska from her. Has the United States ever maintained at any time in the course of this controversy that Russia had acquired a dominion over Behring sea, giving a general right of legislation over Behring sea as if that sea were a part of her territory, and that the United States had in consequence as the successor of Russia acquired any such right as that? Has the United States ever made any such claim as that? Never. At no time in the course of this controversy has it ever made any claim of that sort or hinted a claim of that sort. It has always put its case upon other and very different grounds; namely that Russia had property interests — interests in the nature of colonial trade and other industries — carried on on the shores of Behring sea, which gave her a right to adopt protective measures which might be operative indeed over a reasonable extent of the sea as defensive measures, and that such rights as that the United States has also, not because it acquired them from Russia — because it would have them without any such acquisition; and the only aid that it has asserted as having been derived from Russia was the fact that Russia had established these protective Regulations in Behring sea, and that other nations of the world, including Great Britain, had acquiesced in them; that Great Britain was not now in a condition to complain of them.

It has been, however, the effort — I say the effort, I suppose it has been the belief — of the learned counsel who have had the interests of

Great Britain in charge, to impute to the United States the position of asserting for herself as having derived from Russia a dominion in Behring sea — a sovereign dominion over that sea. That position has been imputed to the United States by the Case of Great Britain, and industriously imputed to it. I do not think there has ever been any good foundation for that.

In the Case of Great Britain, page 134, there is a quite formal statement of the several positions which, according to this Case the United States have taken in reference to this controversy. I read from that.

> The facts stated in this chapter show that the original ground upon which the vessels seized in 1886 and 1887 were condemned, was that Behring Sea was a *mare clausum*, an inland sea, and as such had been conveyed in part by Russia to the United States; that this ground was subsequently entirely abandoned, but a claim was then made to exclusive jurisdiction over one hundred miles from the coast line of the United States territory; that subsequently a further claim has been set up, to the effect that the United States have property in and a right of protection over, fur-seals in non-territorial waters.

That is the description in the Case of Great Britain of the position which has been from time to time taken by the United States in reference to this controversy. It is a total error. As to the first part of it, there is to a certain extent, a foundation for the statement. The first part is "that the original ground upon which the vessels seized in 1886 and 1887 were condemned was that Bering sea was a *mare clausum*, and inland sea, and as such had been conveyed in part by Russia to the United States."

That does not say that the United States ever took that position. It does not say literally that the United States had taken that position. It only says that that was the ground upon which the vessels had been condemned. But I think the intent was to convey the notion that that was the attitude taken by the United States. The paragraph would be meaningless had it not that intent.

It is literally true that libels were filed in the case of these first seizures against these British vessels in the United States District Court of Alaska, and that they were condemned: and the judge in his charge to the jury, or in his opinion giving judgment went into the case and stated that Russia by this ukase had acquired a territorial dominion in Bering sea. He stated that ta shis opinion; but has as judge in the United States District Court of Alaska an authority to speak in an international controversy on behalf of the United States? Certainly none whatever. He is no more an authority than the learned counsel himself. The position of the United States cannot be gathered from what a judge of a United States court happens to say in a charge to the jury. If it can, the United States would be responsible for the utterances of every two penny justice of the peace throughout the land; which she would be very sorry to do.

Where is the position of the United States in reference to this controversy to be sought and found? Why, in the utterances, the responsible utterances, of that Government made to Great Britain in diplomatic form. There is the place, and the only place, where they can properly be sought.

**The President.** — Do you not think a Government is responsible to other nations for its judges?

**Mr Carter.** — To a certain extent, it is; and to a certain extent, it is not.

**The President.** — You must take the nation as a whole.

**Mr Justice Harlan.** — Judges in the United States are independent of the Government.

**The President.** — Not as a nation.

**Mr Justice Harlan.** — Yes; they are independent of the nation.

**Mr Carter.** — If a French citizen should have the misfortune to be involved in litigation in the United States, and a judgment should be pronounced against him which he did not like, and he should appeal to his own Government and say he did not like, and they should appeal to the United States, they would tell him that he had no remedy : that the Government of the United States was not responsible for the conclusions to which the judges came. They might be law : they might not be law : he had had a fair trial; he had had the same opportunity which citizens of the United States would have, and that is all they could give him : and I apprehend a similar answer would be made by the Government of France in a similar case.

**The President.** — I am not quite sure as to that.

**Mr Carter.** — I do not know about France; but I am very sure that is the answerwh ich would be given by Great Britain in a similar case.

**The President.** — It is a rather difficult, and often discussed point of international law, as to what is the responsibility of a nation.

**Mr Carter.** — Every Government is of course responsible in a certain sense to foreign nations, that the citizens of foreign nations, when they happen to fall within the reach of justice shall obtain justice. That is, that they shall obtain the same sort of justice which is administered to the citizens of the country. That is the extent of the foreign obligation.

**Sir Charles Russell.** — You have got a British ship on the ground of that judgment.

**Mr Carter.** — Well, it is no more than a suit against a British citizen. That is all it amounts to. Property of British citizens is attached. That is all the suit amounts to, and all the United States are bound to do is to see that justice is done. The course of procedure in the United States must be followed. If the judgment of the United States District Court of Alaska was complained of, why there was an opportunity to appeal to and obtain the judgment of the highest court in the land. No complaint cou'd be made until that procedure had been followed and run out to its conclusion. It was not done. So no complaint could be made of that judgment, nor could the grounds upon which that judgment was rendered be in any manner imputed to the United States.

**The President.** — I think we had better consider that as a particular question, which we will argue when it comes up later in the case.

**Mr Carter.** — Very well. Where are we to look for the true grounds

upon which the United States based its position in these controversies? Why, obviously to the diplomatic communications. The British Government did protest to the United States that this course was pursued, and that it was pursued, by the authority of the United States in giving instructions to her cruisers; and they ask now. "Tell us the authority upon which you proceed." That was the demand of the British Government — very properly made — " We want to know from you, not from a District judge up in Alaska, but from you, who have the authority to state what your grounds are. It is from you that we wish to know the grounds upon which you presume to seize British vessels. "

That demand was made; and what was the answer to it; for there is where you are to look to ascertain what the position is which the United States Government take. Therefore I must again call the attention of the arbitrators to the response which was first made to these demands.

**The President.** — Do you mean to enter on a new subject?

**Mr Carter.** — I perceive that the hour of adjournment has about arrived; and before I refer to these citations, I might perhaps as well leave that for the next session.

**The President.** — We will meet on next Tuesday morning, at half past 11 o'clock.

The Tribunal accordingly adjourned.

**The President.** — Before Mr Carter begins, I would beg to offer an observation to the gentlemen present. In the course of the last sitting, we had some, I might almost call it, conversation about a delicate matter, a matter subject to much controversy in international law, that is, the responsibility of nations for the justice which is administered by them. I beg to remark that my intention was not at all to express any opinion; I merely wanted to know the extent and purport of the contention of the party concerned. I believe that whenever any one of us addresses to the learned Counsel on either side any observation or question, it is always with the intention of ascertaining how far the intention or contention of either party goes, and not at all to express a personal opinion, which, of course, from our bench we are not called upon to do. I may say still less, as, in this particular case, it might be inferred if the words we pronounced were misconstrued, — much less to express any opinion which would be considered as binding upon the respective countries to which any of us may happen to belong to. It is in reference to the words that I spoke last time that I think it necessary to make this remark.

**Mr Carter.** — I may say, Sir, that I so understood the learned President.

**The President.** — Then, Mr Carter, if you please, we shall be happy to hear you.

**Mr Carter.** — Mr President, my attention has been called to a copy of the London "Times" Monday, which contains some reference to my argument of Friday, and, in certain respects, has misrepresented me to such an extent that I feel hardly at liberty to pass it without notice. I cannot, of course, think myself called upon to correct all misrepresentations of what I may say and which may be found in the journals of the day; and I should not say a word in reference to this except that it has represented me as making some very disparaging allusions, and very unworthy allusions, to a distinguished Judge of the United States, — I mean, the District Judge of the United States for Alaska. I made no observation whatever disparaging to him, though I did indeed say that the Government of the United States could not be held responsible for the grounds and reasons which judges assign in the decisions which they might give. That, if that were the case, the Government might be held responsible for the utterances (as I said, and the observation might possibily, in good taste, have been better withheld) of any "twopenny" Justice of the Peace"; but I did not, of course, apply that observation to

Mr Dawson, or intend in any way to make any disparaging reference to him.

I did not even say that his judgment was incorrect. On the contrary his judgment, so far as related to the condemnation of the vessel, was a sound and correct judgment which in the due course of my argument I shall endeavour to defend, and I have no doubt would have been affirmed to that extent by the supreme court of the United States. Nor in saying that the Government of the United States which was not responsible for the grounds stated by judges in their opinion as the basis of their decisions, did I intend to intimate that the Government was not to a certain extent responsible to other nations for the correctness of the judgments themselves. The Government of the United States is, I suppose, responsible to other nations that the citizens of other nations shall have justice done them in their Courts, but it is the correctness of the judgment for which they are responsible — not the soundness of the opinions which are given as the basis for them.

My argument on Friday was directed mainly to this question of the rights which may have been acquired by Russia in the Behring Sea, and transmitted by her to the United States by means of the act of cession of 1867. I have made a brief historical sketch of what may be called the Russian provisions, closing that sketch with a statement of the ukase of 1821, and of its real nature. I then came to take up the view which the United States took in relation to the ukase of 1821, and the rights which might have been acquired under it, and I stated that, according to the view of the United States, that ukase never asserted a right of sovereign dominion over any part of Behring Sea, but that its sole purpose, intention, and effect was to assert a right to protect industries connected with the shore, by protective regulations, operative over a certain portion of the sea, a thing quite different from any general assertion of sovereign dominion. I said that that was the view taken by the United States, and which always had been taken by the United States. It was in that connection that I observed that although a somewhat different view had been taken by the learned district judge of Alaska, the United States had never adopted that view in its diplomatic communications with Great Britain. I further said that there was apparently an endeavour which was put forth in the British Case, imputing to the United States the view that Russia had acquired a sovereign dominion over that sea, intimating that the United States had originally based its case upon that view, and had afterwards shifted its ground. That assertion I deny; and it was at that point that the Tribunal rose. It is my purpose now to support that denial, and to show that from the first the United States took but one position in reference to this matter, and have retained it at all times during the controversy.

In order to show this I called the attention of the Tribunal to Lord Salisbury's complaint. It will be found at page 162 of the first volume of the United States Appendix. I have already referred to this letter, but it is important that I should now refer to it again. It is not the first time

that the British Government protested against these seizures, but it is the first time at which that Government stated the grounds of its complaint. Lord Salisbury had, prior to the writing of this letter, received from the United States Government copies of the records of the United States District Court of Alaska, from which it appeared that the condemnations in that Court were founded upon libels filed for the purpose of enforcing the municipal law which forbad the taking of these seals, and by which it appeared also the seizures had been effected at a greater distance than three miles from the shore. It is on this ground that Lord Salisbury conceives that the seizures were not justified, and he explains that ground quite fully, and closes his letter with these observations.

> Her Majesty's Government feel sure that in view of the considerations which I have set forth in this despatch which you will communicate to Mr Bayard, the Government of the United States will admit that the seizure and condemnation of these British vessels and the imprisonment of their masters and crews were not warranted by the circumstances and that they will be ready to afford reasonable compensation to those who have suffered in consequence, and issue immediate instructions to their naval officers which will prevent the recurrence of these regrettable incidents.

Mr Bayard's first communication after that will be found on page 168. — I refer to his first communication in relation to these seizures. He then had before him the letter which I have just read of Lord Salisbury. He had before him the grounds upon which Lord Salisbury based his objection to these seizures, and he was invited therefore to a discussion of those grounds and reasons. As I have already remarked, Mr Bayard thought proper to waive or avoid that discussion for the then present, at least, and to rely upon conciliatory measures; and the terms on which he did this will be found in a letter to which I now call attention, and as it is very short, I will read it again, although I have read it once before. These are instructions from him to the United States Ministers abroad, the same letter being sent to the Ministers of several Powers, Great Britain included.

**Sir Charles Russell.** — My learned friend has not observed the date of that letter which is a month earlier tham the communication from Lord Salisbury. Lord Salisbury's letter is in September; that communication is in August.

**Mr Carter.** — I am obliged to my learned friend for that information. He is entirely right, and let me withdraw the observation that I had made that when Mr Bayard wrote that letter he had before him the letter of Lord Salisbury which I have just read. He did not have it before him, but he did have before him the protest against the seizures which had been made to him by the British Minister in Washington. He did have those before him, and I can easily turn to them. There were several letters from the British Minister and one of them perhaps the first was on the 27th September 1886, and is to be found on page 53. The next is one of the same character. The next is a communication from the

Earl of Iddesleigh to Sir Lionel Sackville West, but it was also communicatid to Mr Bayard. That is on the 30ct October 1886. As I have said there was considerable delay on the part of Mr Bayard in answering these demands of the British Government, delay arising from the circumstance that the place from which the information was sought was so remote.

Those observations will be sufficient to enable the learned Arbitrators to understand the view first taken in reference to the matter before Mr Bayards and which is contained in the letter of the 19th August 1887.

Sir : Recent occurences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea. Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable, — and I am instructed by the President so to inform you, — to attain the desired ends by international coöperation.

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and, by breaking up their habitual resorts, has greatly reduced their number. Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seals in Behring Sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of these animals and consequent serious loss to mankind. The Ministers of the United States to Germany, Sweden and Norway, Russia, Japan, and Great Britain have been each similarly adressed on the subject referred to in this instruction.

I am, etc.

T. F. Bayard.

That was the first attitude taken by the Government of the United States towards the Government of Great Britain in reference to this question and to the questions which might be involved in it. Distinct discussion is avoided. All extreme assertions are waived in view of the conciliatory purposes for which it was written; nevertheless, the grounds upon which the Government would put the case are not indistinctly foreshadowed. They are, that the property in question in the seals was of a peculiar nature, and that the proper protection of it might justify the exercise by the United States of an exceptional marine jurisdiction. There is no assumption of exclusive dominion over Behring Sea or anything of the kind. That was the attitude taken by the Government of the United States during the administration of President Cleveland, and which I have ventured to call, in giving an account of the whole controversy, the first stage of the controversy.

The next stage of it is occupied with the dealings with the subject during the administration of President Harrison; and the first assertions by President Harrison's administration of the gounds upon which the

United States based the assertion of its rights connected with the seal industries are, as the learned Arbitrators will remember, set forth by Mr Blaine in his note in January the 22nd, 1890, which is found upon page 200. That letter I have once read. It is quite long, and I do not think it necessary to repeat the reading of it. It is, however, important to consider the substance of it; and I shall venture to state that, so far as it relates to the grounds upon which the United States proceed, the substance of it is this; that these seals are animals in a high degree useful to mankind; that Russia when engaged in the industry of preserving them, cherishing them, and taking the annual increase on the Pribilof Islands at a very early period and from the time when she first engaged in that industry down to the time when it was invaded by the practice of pelagic sealing, that no other nation and no other people had ever attempted to interfere with that right; that the United States acquired this industry together with the rest of their acquisitions from Russia by the treaty of 1867; and that the United States had acquired the same interest in substantially the same way and without any interference by other nations or other men till the practice of pelagic sealing was introduced; that this practice of pelaging sealing was destructive of the seal, and, therefore, destructive, not only of this particular industry of the United States, but destructive of the interests which all mankind had in this animal, and that it was a pure wrong, to use his phrase *contra bonos mores;* and that, consequently, the United States had a right to prevent this invasion of one of its own industries which was thus carried on without any right whatever and which was purely the assertion of a wrong. Those are the grounds taken by Mr Blaine in this note. That is the same ground that the Government of the United States has asserted from the first, and which it still continues to assert.

Now, in order to shew that those grounds were perfectly well understood at that time and especially by the British Government, I call attention to Lord Salisbury's note in reference to this, which will be found on page 207, — this is really Lord Salisbury's answer, — and he undertakes to reduce to distinct points the several positions taken by Mr Blaine in this somewhat long letter; and I will, therefore, read some of it:

Mr Blaines note defends the acts complained of by Her Majesty's Government on the following grounds (1). That the Canadian vessels arrested and detained in the Berhing's Sea were engaged in a pursuit that is in itself *contra bonos mores*, — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States (2). That the fisheries had been in the undisturbed possession, and under the exclusive control, of Russia from their discovery until the Cession of Alastea to the United States in 1867, and that from this date onward until 1886 they had also remained in the undisturbed possession of the United States' Government (3). That it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to the extinction of the species, and that therefore nations not possessing the territory upon which seals can increase their numbers by natural growth should refrain from the slaughter of them in the open sea. Mr Blaine further argues that the law of the sea and the liberty which it confers do not justify acts which are immoral in themselves, and

which inevitably tend to results against the interests and against the welfare of mankind; and he proceeds to justify the forcible resistance of the United States Government by the necessity of defending not only their own traditional and long established rights, but also the rights of good morals and of good government the world over.

I have no fault to find with that statement by Lord Salisbury. It exhibits a clear understanding of the position taken by Mr Blaine, and well enough describes it, except indeed the last sentence, where he imputes to the United States Government an intention or a disposition to defend " the rights of good morals and of good Government the world over ". If that means that they had asserted a right to undertake to do that without a reference to their own interests, why, the observation is not correct.

Now, the next occasion on which Mr Blaine dealt with the subject was in his letter of June the 30th, 1890, which is to be found of page 224. In that note he takes up the points Lord Salisbury had dealt with before, of Russian claims in Behring sea, and undertakes to answer and to refute Lord Salisbury's view in reference to it; but he does not in that letter in the slightest degree change the attitude which he had previously assumed in reference to pelagic sealing so far as respecting the ground upon which the Government of the United States based its views; and he expressly takes care that it shall not be understood that the United States make any assertion of a right of *mare clausum* as to any part of Behring sea.

He says — I will read the paragraph from his letter, page 233.

The result of the protest of Mr Adams, followed by the co-operation of Great Britain, was to force Russia back to 54°40' as her southern boundary.

But there was no renunciation whatever on the part of Russia as to the Behring Sea, to which the ukase especially and primarily applied. As a piece of legislation this ukase was authoritative in the dominions of Russia as an act of Parliament is in the dominions of Great Britain, or any act of Congress in the territory of the United States. Except as voluntarily modified by Russia in the Ireaty with the United States, 17th April, 1824, and in the Ireaty with Great Britain, 16th February, 1825, the ukase of 1821, stood as the law controlling the Russian possessions in America until the close of Russia's ownership by transfer to this Government.

Both the United States and Great Britain recognized it, respected it, obeyed it. It did not, as so many suppose, declare the Behring Sea to be *mare clausum*. It did declare that the waters, to the extent of 100 miles from the shores, were reserved for the subjects of the Russian Empire. Of course, many hundred miles east and west and north and south were thus intentionally left by Russia for the whole fishery, and for fishing open and free to the world, of which other nations took large advantage. Perhaps in pursuing this advantage, foreigners did not always heep 100 miles from the shore; but the theory of right on which they conducted their business unmolested was that they observed the conditions of the ukase. But the 100 mile restriction performed the function for which it was specially designed in preventing foreign nations from molesting, disturbing, or by any possibility sharing in the fur-trade.

The fur-trade formed the principal, almost the sole, employment of the Russian American Company.

He there asserts that it was not the purpose of the Ukase of 1821 to

establish a *mare clausum*, as was by so many supposed, but that its, object was to preserve, for the exclusive use and enjoyment by Russian subjects, the benefits of the fur-trade, the 100 mile exclusion being an instrumentality for that purpose.

The next important note in the correspondence is that of August 2nd 1890, by Lord Salisbury, and that again is confined to this discussion of Russian rights, and there is nothing, I believe, appertaining to the point which I am now upon, namely that of showing what the distinct attitude of the Government of the United States was. This was in the course of the correspondence, and controversy between Mr Blaine and Lord Salisbury, concerning the extent of the Russian possessions, and the extent to which they had been acquiesced in.

To that Mr Blaine rejoins in a letter which is found on page 285. It begins at page 263, and it is that letter which contains the single observation which might be taken as a justification for the statement that Mr Blaine had put the American claims in the controversy, upon the basis of an acquisition by Russia, and a transmission to the United States, of her sovereign dominion over Behring sea. That observation I have already alluded to, but I will allude to it again. It is found on page 263.

> The United States contends that the Behring Sea was not mentioned or even referred to in either treaty, and was in no sense included in the phrase Pacific Ocean.

The contention between Mr Blaine and Lord Salisbury had become narrowed down to the point whether the phrase " Pacific Ocean " as used in the Treaty, included Behring Sea, or not, and Mr Blaine says.

> If Great Britain can maintain her position that the Behring Sea at the time of the treaties with Russia, of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well grounded complaint against her. If, on the other hand, this Government can prove, beyond all doubt, that the Behring Sea at the date of the treaties was understood by the three signatory powers to be a separate body of water, and was not included in the phrase Pacific Ocean, then the American case against Great Britain is complete and undeniable.

Those observations standing alone may certainly be fairly taken as indicating that Mr Blaine had put the whole position of the United States in this controversy upon its ability to maintain that Russia had acquired, by the Ukase of 1821, and other Acts of assuming authority, a sovereign jurisdiction over the Behring Sea. It is impossible that he could have intended it, and I say it is impossible that he could have intended it, because it is utterly, inconsistent with what he says in the same letter. I rather assume that he intended, by that observation, that if Great Britain succeeded in making out her case, why, the United States, so far as that question was concerned, would have no ground of complaint against her : and, so, on the contrary, if the United States succeeded in making out her case, why, that Great Britain, so far as that question was concerned, would have no just ground of complaint against the seizures. But that he did not mean to change his ground, becomes perfectly plain and evident

from his more distinct assertion near the close of the same letter, and I must again read from page 286. He says.

The repeated assertions that the Government of the United States demands that the Behring sea be prononced *mare clausum*, are without foundation. The Government has never claimed it and never desired it It expressly disavows it. At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Behring sea for the protection of the fur seals. Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*. Nor is it by any means so serious an obstruction as Great Britain assumed to make in the South Atlantic, nor so groundless an interference with the common law of the sea as is maintained by British authority to day in the Indian Ocean.

The President does not, however, desire the long posponement which an examination of legal authorities from Ulpian, to Phillimore and Kent, would involve. The finds his own views well expressed by Mr Phelps our late minister to England when after failing to secure a just arrangement with Great Britain touching the Seal fisheries, he wrote the following in his closing communication to his own Government: — Sept 12, 1888. Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

Here is a valuable fishery and a large, and, if properly managed, permanent industry, the property of the nation on whose shores it is carried on. It is proposed by the colony of a foreign nation in defiance of the joint remonstrance of all the countries interested to destroy this business by the indescriminate slaughter and extermination of the animals in question, in the open neighbouring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations, because the sea at a certain distance from the coast is free.

The same line of argument would take under its protection piracy and the slave trade when prosecuted in the open see, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelict in the open sea near its coasts. There are many things that cannot be allowed to be done on the open sea with impunity and against which every sea is *mare clausum*; and the right of self-defence as to person and property prevails there as fully as elsewhere. If the fish upon canadian coasts could be destroyed by scattering poison in the open sea adjacent with some small profit to those engaged in it, would Canada, upon the just principles of international law be held defenceless in such a case? That process would be no more destructive, inhuman, and wanton than this. If precedents are wanting for the defence so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose undeterred by the discussion of abstract and inadequate rules.

Now Lord Salisbury in a note subsequent to this, dated February 21st 1891, again attempted to impute to Mr Blaine a reliance, and a sole reliance, on Russian pretensions instead of upon a principle of property right, and that will be found at page 290: He says in the paragraph near the bottom of the page

The claim of the United States to prevent the exercise of seal fishery by other nations in Behring Sea rest now exclusively upon the interest which by purchase they possess in a ukase issued by the Emperor Alexander I in the year 1821, which prohibited foreign vessels from approaching within 100 italian miles of the coast,

and islands then belonging to Russia in Behring Sea. It is not as I understand contended that the Russian Government at the time of the issue of this ukase possessed any inherent right to enforce such a prohibition or acquired by the act of issuing it any claims over the open sea beyond the territorial limit of 3 miles which they would not otherwise have possessed.

But it is said that this prohibition, worthless in itself, acquired validity and force against the British Government, because that Government can be shown to have accepted its provision.

The ukase was a mere usurpation; but it is said that it was converted into a valid international law, as against the British Government by the admission of that Government itself. I am not concerned to dispute the contention that an invalid claim may, as against another Government, acquire a validity which in its inception it did not possess if it is formally and effectively accepted by that Government. But the vital question for decision is whether any other Government, and especially whether the Government of Great Britain, has ever accepted the claim put forward in this ukase.

Now Lord Salisbury, I do not think, could very fairly with the correspondence with Mr Blaine before him, which I have already read, impute to the United States Government a sole reliance upon a jurisdiction asserted to have been acquired by Russia; but Lord Salisbury attempts to do it there, but is very sharply corrected by Mr Blaine in a subsequent note of April 14th 1891, which will be found on page 295. I am reading now from page 298.

In the opinion of the President, Lord Salisbury is wholly and strangely in error in making the following statement. (This is quoted as being the statement of Lord Salisbury)— " nor do they [the advisers of the President] reply as a justification for the seizure of British ships in the open sea upon the contention that the interests of the seal fisheries give to the United States Government any right for that purpose which according to international law, it would not otherwise possess. "

Then Mr Blaine proceeds :

The Government of the United States have steadily held just the reverse of the position which Lord Salisbury has imputed to it. It holds that the ownership of the islands, upon which the seals breed, that the habit of the seals in regularly resorting thither and rearing their young thereon, that their going out from the islands in search of food and regularly returning thereto, and all the effects and incidents of their relation to the island give to the United States a property interest therein; that this property interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest, so far as recognition is implied by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first 19 years of the sovereignty of the United States. It is yet to be determined whether the lawless intrusion of Canadian vessels in 1886 and subsequent years has changed the law and equity of the case theretofore prevailing.

With this extract, I conclude my observations concerning the attitude taken by the Government of the United States from first to last, which was based upon the assertion of a property interest in these seals, strengthened, indeed, by the allegation that the property interest had been originally held by Russia, and while held by Russia had been recognized both by Great Britain and the United States; and that the possession of this property interest by the United States gave it the right — a right

which every Government has — to protect its property wherever that property has a right to be, and by such measures as are necessary for the purposes of such protection.

Now we have then out of this case itself an argument (as far as I am capable of putting out of it any argument) as to whether Russia ever acquired a sovereign jurisdiction over any part of Behring Sea, or whether she ever transmitted to the United States any sovereign jurisdiction over any part of it. We make no assertion of that character. We put no part of our case upon any such assertion. We do not suppose that any such acquisition of such jurisdiction was ever made by Russia, or transmitted by her to the United States. Well, does that mean that this matter of Russian pretensions in Behring Sea, the rights which she may have asserted and acquired in those remote quarters, and which the United States may have acquired from her, have no place or importance in this controversy? No; I do not mean that. They did have a place, and an important place, which I am now about, as far as I am able, to vindicate for them, and it is this. It could hardly be better expressed than Mr Blaine has expressed it in the passage from which I last read — that this property interest which he asserts the United States has,

> Was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest so far as recognition is implied by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first years' sovereignty of the United States.

Now I am going to deal with this subject and very briefly. The question mainly turns upon what rights Russia did originally assume in Behring Sea, and whether those rights were ever displaced or modified by the subsequent Treaties between her and the United States and Great Britain, in and 1824 and 1825, if displaced or modified, to what extent? I am going to deal, I say, very briefly with that argument, and for two reasons: first, as I have already intimated, I do not suppose that it plays any vital part whatever in this controversy, and therefore I should do injustice to the general argument of the question, if I should assign a disproportionate space to it; and I could not go through with the argument and refer to all the diplomatic communications and national acts of the various countries which have a bearing upon it, without employing several days in the discussion. I have neither time nor strength for that; and I am not going into it. If I did it, I could not implant such a memory — such an impression — of the particular incidents of the controversy as would enable you to remember it for any succession of days. It will be inevitably a task which the learned Arbitrators will find it necessary to go through to examine this diplomatic correspondence, and to examine the grounds taken by the American Government in the various communications upon this subject with Mr Blaine. I could not lessen that labour materially by any effort in the way of discussion at large which I might make now; nevertheless I must deal with it very briefly.

Now I have endeavoured to point out, in the sketch with which I began this part of my argument, the early dealing on the part of Russia with Behring Sea, and its coasts and islands, and I think I succeeded in showing that Russia, prior to 1821, had appropriated to herself all the coasts and islands of that sea and all their resources, so far as any nation could appropriate : That such appropriation was just, and in accordance with natural law. There was enough only for one great nation, and the world would be best served by such exclusive appropriation.

We do not assert an appropriation of the products of the sea unconnected with the shores — we assert no such appropriation on the part of Russia. Russia asserted the right to protect her trade and industry by the exercise of self defensive authority upon the seas, and practically by excluding other nations from a belt of water extending 100 miles from the coasts and islands. She declared this to be not an assumption of sovereignty or *mare clausum* or an attempt to establish *mare clausum*, but a scheme of self-defence. That assertion and authority was protested against — formed the subject of negociation, and was eventually modified by treaties between Great Britain and the United States severally and Russia. Now except so far as this modified the effect of the Ukase, it stood and stood assented to by Great Britain and the United States. The assent was not an implied one, but the implication was sufficiently strong. The enquiry then arises, how far the assumption of authority by Russia in the Ukase of 1821 and her acts in support of it were modified or displaced by these subsequent treaties; in other words it involves an interpretation of the language and effect of the se subsequent treaties.

Now as the interpretation of those documents is not entirely easy upon the face of them, it will be proper to place ourselves in the possession of certain information in regard to the matter covered by treaties which will be useful to us in the endeavour to ascertain what the intentions of the particular parties to them were.

Now the two sections of the Ukase which it is necessary to read will be found in page 16 of the first volume of our Appendix : — Section I :

> The pursuits of commerce whaling and fishery and of all other industries on all islands ports and gulfs including the whole of the north west coast of America beginning from Behring's straits to 51 °of northern latitude also from the Aleutian Islands to the Eastern coast of Siberia as well as along the Kurile Islands from Behring's Straits to the south cape of the island of Urup viz, to the 45° 50° northern latitude, is exclusively granted to Russian subjects.

Then Section II says.

> It is therefore prohibited to all foreign vessels not only to land on the coasts and Islands belonging to Russia as stated above but also to approach them within less than 100 miles.
>
> The transgressors vessel is subject to confiscation along with the whole cargo.

Now it would seem that when the Government of Great Britain received information of that ukase, they applied to so eminent an authority as Lord Stowell to learn what the effect of it was; and he writes to Lord Melville

on the 26th December 1821, I am reading from the Appendix to the case of Great Britain, volume 2, page 12.

My dear lord, I have perused these papers, and it appears to me to be unsafe to proceed to any controversial discussion of the proposed Regulations, till it is shown that they issue from a competent authority founded upon an acknowledged title of territorial and exclusive possession of the portions of the globe to which they relate. I am, myself, too slightly acquainted with the facts regarding such possession (how originally acquired and how subsequently enjoyed) to be enabled to say that upon undisputed principles such a possession exists. It is perfectly clear from these regulations that it has not hitherto been exclusive in the extent in which it is now claimed; for they are framed for the very purpose of putting an end to foreign intercourses of traffic therein, which they denominate *illicit*, but which they admit existed *de facto*. The territories claimed are of different species — islands — portions of the continent and large portions of the sea adjoining. I know too little of the history of their connection with either islands or continents to say with confidence that such a possession has in this case been acquired. I content myself with remarking that such possession does not appear in the opinion and practice of States to be founded exactly upon the same principles in the cases of islands and continents. In that of islands, discovery alone has usually been held sufficient to constitute a title. Not so in the case of continents. In the case of the South American Continent the Spaniards and Portuguese resorted to grants from an authority which in that age was universally respected, and continued in respect till subsequent possession had confirmed their title.

But I think that it has not been generally held, and cannot be maintained that the mere discovery of a coast gives a right to the exclusive possession of a whole extensive continent to which it belongs, and less to the seas that adjoin to a very considerable extent of distance. An undisputed exercise of sovereignty over a large tract of such a continent, and for a long tract of time would be requisite for such purposes. I am too ignorant of particular facts to say how far such principles are justly applicable to such cases. I observe that by these regulations the commerce in these islands, continents, and adjoining seas is declared to have been granted exclusively to Russian subjects; who the granter is, is not expressly declared. If, as is probable, the Autocrat of Russia is meant, the enquiry then reverts to the question respecting the foundation of such an authority, and thinking that that question must be first disposed of, I content myself with observing upon the Regulations themselves that they are carried to an extent that appears very unmeasured and insupportable.

I have, etc.,

STOWELL.

I read that letter for the purpose of showing two things. First, the views of a distinguished jûrist of that age upon the question of what right was acquired by the discovery of new regions, and what acts were necessary for the purpose of really constituting property in them; and next for the purpose of showing that Lord Stowell gathered right off upon the face of those Regulations that they were not designed as assuming sovereign jurisdiction over the sea, but defensive Regulations for the purpose of protecting the commerce and the industries of a region over which it was assumed that Russia had the sovereign control. He as you will observe, rests the conclusion as to the validity of those Regulations upon the completeness and perfectness of the sovereignty which had been acquired by the nation which had issued them. Here I may also refer to an opinion of Sir Robert Phillimore, evidently in reference to this very territory, because I think it appears at an early period that this whole territory, inclu-

ding Alaska, was vaguely understood by the world in general to be embraced in the term "Oregon".

Now the passage from Sir Robert Phillimores book, which I shall refer to is contained at page 39 of our argument. He says:

A similar settlement was founded by the British and Russian Fur Companies in North America. The chief portion of the Oregon territory is valuable solely for the fur-bearing animals which it produces. Various establishments in different parts of this territory organized a system for the preservation of these animals, and exercised for these purposes control over the native population. This was rightly contended to be only exercise of *proprietary right* of which these particular regions were at that time susceptible, and to mark that a *beneficial use* was made of the whole territory by the occupants.

That seems to me very reasonable, and to tend very much to support the observations which I made at an early period of this argument, to the effect that these northern regions, producing only one product, which can easily be gathered by one nation, were fully appropriated by Russia to herself in the colonial establishments which she had formed for that purpose.

Now it was this pretension, and under this aspect, which engaged the attention of Great Britain. In order to ascertain what her view was in reference to it, and how far she complained of it (I may speak of both Great Britain and the United States), and how for they complained of it, we must look to the protests which were made, and the first British protest in reference to it will be found on page 14 of the Appendix to the British case, Volume II.

*From the Marquis of Londonderry to Count Lieven:*

Foreign office, January 18th, 1822.

The undersigned has the honour hereby to acknowledge the note addressed to him by Baron de Nicolai of the 12th November last, covering a copy of an ukase issued by His Imperial Majesty the Emperor of all the Russias, and bearing date the 4th September, 1821, for various purposes, therein set forth, especially connected with the territorial rights of his Crown on the northwestern coast of America, bordering upon the Pacific, and the commerce and navigation of His Imperial Majesty's subjects in the seas adjacent thereto. This document, containing regulations of great extent and importance, both in its territorial and maritime bearings, has been considered with the utmost attention, and with those favorable sentiments which His Majesty's Government always bear towards the acts of a state which His Majesty has the satisfaction to feel himself connected, by the most intimate ties of friendship and alliance; and having been referred for the report of those high legal authorities, whose duty it is to advise His Majesty on such matters;

The undersigned is directed, till such friendly explanations can take place between the two governments as may obviate misunderstanding upon so delicate and important a point, to make such provisional protest against the exactments of the said ukase as may fully serve to save the rights of His Majesty's Crown, and may protect the persons and properties of His Majesty's subjects from molestation in the exercice of their lawful callings in that quarter of the globe.

The undersigned is commanded to acquaint Count Lieven that it being the king's constant desire to respect, and cause to be respected by his subjects in the fullest manner, the emperor of Russia's just rights, His Majesty will be ready to enter into amicable explanations upon the interests affected by his instrument, in such manner as may be most acceptable to this Imperial Majesty.

In the meantine, upon the subject of this ukase generally, and especially upon the two main principles of claim laid down therein, namely, an exclusive sovereignty alleged to belong to Russia over the territories therein described, as also the exclusive right of navigating and trading within the maritime limits therein set forth, his Britannic Majesty must be understood as reserving all his rights. Not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts, and in those seas, can be deemed to be illicit, or that the ships of friendly powers, even supposing an unqualified sovereignty was proved to appertain to the Imperial Crown in these vast and very imperfectly occupied territories, could, by the acknowledged law of nations, be excluded from navigating within the distance of 100 Italian miles as therein laid down from the coast, the exclusive dominion of which is assumed (but, as His Majesty's Government conceive, in error) and belong to His Imperial Majesty the Emperor of all the Russias.

That protest would appear to be rather framed in the doubtful and indeterminate form suggested by Lord Stowell's observations upon the ukase. It does, however shadow forth, rather vaguely, complaints against this ukase of a twofold character. First, its assumption of territorial sovereignty over those shores, and next the attempt to exclude citizens of other nations from 100 miles on the sea mentioning both points. That is the British protest, the first one.

The United States protest will be found in volume I, page 132. It seems that the ukase was transmitted on the 11th February 1822 by Mr de Poletica, the Russian Minister in Washington, to Mr Adams, the American Secretary of State at that time, and on the 25th Mr Adams addresses this note to Mr de Poletica.

Sir: I have the honor of receiving your note on the 11th instant enclosing a printed copy of the Regulations adopted by the Russian American Company and sanctioned by His Imperial Majesty relating to the commerce of foreigners in the Waters bordering on the Establishments of that Company upon the northwest coast of America.

I am directed by the President of the United States to inform you that he has seen with surprise in this edict the assertion of a territorial claim on the part of Russia extending to the 51° of north latitude on this continent, and a Regulation interdicting to all commercial vessels other than Russian upon the penalty of seizure and confiscation the approach upon the high sea within 100 Italian miles from the shores to which that claim is made to apply. The relations of the United States with His Imperial Majesty have always been of the most friendly character, and it is the earnest desire of this Government to preserve them in that state. It was expected before any act which should define the boundary between the territories of the United States and Russia on this continent that the same would have been arranged by treaty between the parties. To exclude the vessels of our citizens from the shore beyond the ordinary distance to which the territorial jurisdiction extends, has excited still greater surprise.

This ordinance affects so deeply the rights of the United States and of their citizens, that I am instructed to inquire whether you are authorised to give explanations of the grounds of right upon principles generally recognized by the laws and usages of nations which can warrant the claims and regulations contained in it.

Now that was the protest of the United States. It was answered by the Russian Minister, M. de Poletica, in a note which is found on page 133 and which I have already read and will therefore not repeat, observing

in regard to it only, that the Russian Minister in that note says that this ukase is not an attempt to make the Behring Sea or any part of it *mare clausum*, but that it is adopted as a measure of prevention to protect the commerce and industries of Russia in that sea.

**Sir Charles Russell.** — We think that the answer of M. de Poletica is very important, and we do not admit that that is a correct summary of it.

**Mr Carter.** — Do you prefer that it should be read?

**Sir Charles Russell.** — No, just as you think right.

**Mr Carter.** — I am quite willing that you should read it now.

**Sir Charles Russell.** — Oh no.

**Mr Carter.** — Now negociations at once began between Russia and Great Britain and the United States in reference to the assumption of authority contained in this ukase, and they were at first jointly conducted. It appears in the correspondence here and I will not take time to read the various letters in which it appears for the purpose of showing it, but it does sufficiently appear. Great Britain and the United States acted in conjunction and each was sufficiently fully apprised of the view of the other. That common action continued for a considerable length of time in the negotiations and was finally broken off — broken off as I apprehend and as I think is evident from the correspondence — because the United States Government had taken the attitude in course of the correspondence that it would not recognise any further establishment of European powers on the North American Continent, a suggestion of a doctrine subsequently known amongst Statsmen as the Monroe doctrine. Mr Monroe was then president of the United States and in consequence of that suggestion Great Britain withdrew from her joint action with the United States in the negociation. But as I rather assume and as I think is natural and indeed it is evident kept herself apprised of the course of the negociation between Russia and the United States. But Russia and the United States were of course, acting as they were in concert at first, fully acquainted with each other's actions, and as I think I may say had the same interest in the matter.

**The President.** — Was there a formal declaration that the two powers would cease to act jointly, and was that in fact grounded on the Monroe doctrine.

**Mr Carter.** — There was a formal declaration that the powers would cease to act jointly, and that was grounded on the Monroe doctrine. I cannot now point to the particular letter, but that is the fact.

**The President.** — And the motive given was the doctrine of President Monroe.

**Mr Carter.** — I am not able to say that that is the reason given in the statement, but that, I think, was the fact. I may be able to answer the learned President in a moment, but I cannot lay my hand, at present, on the correspondence showing the grounds on which Great Britain withdrew her participation.

**The President.** — Perhaps it is not material to your argument.

**Mr Carter.** — Here is a note which, perhaps, throws light upon it. this is an extract from Mr Rush, the American Minister at St Petersbourg, to his own Government, dated January 9th, 1824, and I read from the American State Papers, volume 5, page 463.

**Mr Justice Harlan.** — Perhaps what you are hunting for is on page 48 of this volume 2 of the British Case, a letter from Mr Canning to Sir Charles Bagot. There are some allusions to it there.

**Mr Carter.** — Yes, but I will read this letter to which I refer.

London, January 9th, 1824 :

Sir, I have heretofore written to you on the 6th and 22nd December, and have now to inform you that from interviews which I have had with Mr Canning, since the present month set in, I find that he will decline sending instructions to Sir Charles Bagot to proceed, jointly with your Government and that of Russia, in the negotiations relative to the northwest coast of America, but that he will be merely informed that it is now the intention of Great Britain to proceed separately.

Mr Canning intimated to me that to proceed separately was the original intention of his Government, to which effect Sir Charles Bagot had been instructed, and never to any other; and that Sir Charles had only paused under your suggestion to him of its being the desire of our Government that three powers should move in concert at St. Petersburg, upon this subject.

The resumption of its original correspondence by this Government — that is, the Government of Great Britain — has arisen chiefly from the principles which our Government has adopted of not considering the American continents as subjects for future colonization by any of the European powers, a principle to which Great Britain does not accede.

And Mr Canning's version of the same affair will be found at page 48 of volume 2 of the Appendix to the British Case. Mr Canning says in a note to Sir Charles Bagot,

By admitting the United States to our negotiation with Russia, we should incur the necessity of discussing the American claim to latitude 51° at the same time that we were settling with Russia our respective limits to the northward.

But the question of the American claim is for the present merged in the convention of 1818; and it would be a wanton increase of difficulties to throw that convention loose, and thus to bring the question which it has concluded for a time into discussion, precisely for the purpose of a coincidence, as embarrassing as it is obviously unnecessary.

If Russia, being aware of the disposition of the United States to concede to her the limit of latitude 55°, should on that account be desirous of a joint negotiation, she must recollect that the proposal of the United States extends to a joint occupancy also, for a limited time, of the whole territory belonging to the three powers; and that the convention now subsisting between us and the United States gives that joint occupancy reciprocally to us in the territory to which both lay claim.... — These reasons had induced us to hesitate very much as to the proposition of the United States for a common negotiation between the three Powers; when the arrival of the speech of the President of the United States, at the opening of the Congress, supplied another reason at once decisive in itself, and susceptible of being stated to Mr Rush with more explicitness than those which I have now detailed to your Excellency; I refer to the principle declared in that speech, which prohibits any further attempts by European powers at colonization in America.

So that the original action in common, between Great Britain and the

United States, the subsequent breaking up of that common action by Great Britain, and the reason for it, will appear to be quite evident. They are important, however, in my present argument, only as showing that Great Britain and the United States, acting, as they originally did, in common, were at the start entirely well acquainted with the views of each other.

Now the next piece of evidence which is important to notice, in order to ascertain the views with which the two parties approached this negotiation, for that is what I am now upon, is to look to the instructions issued to the negotiators, and I call attention to the instructions from the United States Government, which will be found in a letter from Mr John Quincy Adams, to Mr Minister Middleton, on page, 41 of the first volume of the Appendix. That letter, I think, I ought to read the whole of.

SIR: I have the honor of enclosing herewith copies of a note from Baron de Tuyll, the Russian Minister, recently arrived, proposing, on the part of His Majesty the Emperor of Russia, that a power should be transmitted to you to enter upon a negotiation with the Ministers of his Government concerning the differences which have arisen from the Imperial Ukase of 4th (16th) September, 1821, relative to the northwest coast of America, and of the answer from this Department acceding to this proposal. A full power is accordingly inclosed, and you will consider this letter as communicating to you the President's instructions for the conduct of the negotiation

From the tenor of the ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the fortyfifth degree of north latitude, on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American Continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the Peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are concerned, are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the Continent of America.

The correspondence between Mr Poletica and this Department contained no discussion of the principles or of the facts upon which he attempted the justification of the Imperial Ukase. This was purposely avoided on our part under the expectation that the Imperial Government could not fail, upon a review of the measure, to revoke it altogether. It did, however, excite much public animadversion in this country as the Ukase itself had already done in England. I enclose herewith the North American Review for October, 1822, No 37, which contains an Article (page 370) written by a person fully master of the subject; and for the view of it taken in England, I refer you to the 52nd number of the Quarterly Review, the Article upon Lieutenant Kotzebue's Voyages. From the Article in the North American Review, it will be seen that the rights of discovery, of occupancy, and of uncontested possession alleged by Mr Poletica are all without foundation in fact.

It does not appear that there ever has been a permanent Russian settlement on this continent south of latitude 59°, that of New Archangel, cited by Mr Poletica, in latitude 57°30', being upon an island. So far as prior discovery can constitute a foundation of right, the papers which I have referred to prove that it belongs to the United States as far as 59° north, by the transfer to them of the rights of Spain. There is, however, no part of the globe where the mere fact of discovery could be

held to give weaker claims than on the northwest coast. The great sinuosity, says Humboldt, formed by the coast between the fifty-fifth and sixtieth parallels of latitude embraces discoveries made by Gali, Behring, and Tchivikoff, Quadra, Cook, La Perouse, Malespier and Vancouver. No European nation has yet formed an establishment upon the immense extent of coast from Cape Mendocino to the fifty-ninth degree of latitude. Beyond that limit the Russian factories commence, most of which are scattered and distant from each other, like the factories established by the European nations for the last three centuries on the coast of Africa. Most of these little Russian colonies communicate with each other only by sea, and the new denominations of Russian America, or Russian possessions in the New Continent, must not lead us to believe that the coast of Behring's bay, the peninsula of Alaska, or the country of the Ischugatschi have become Russian provinces in the same sense given to the word when speaking of the Spanish provinces of Sonora or New Biscay." (Humboldts *New Spain*, vol. II, book III, chapter 8, page 496.)

In M. Poletica's letter of 28th February, 1822, to me, he says that when the Emperor Paul I granted to the present American Company its first charter, in 1799, he gave it the exclusive possession of the northwest coast of America, which belonged to Russia, from the fifty-fifth degree of north latitude to Behring strait.

In his letter of 2nd of April, 1822, he says that the charter of the Russian American Company, in 1799, was merely conceding to them a part of the sovereignty, *or rather certain exclusive privileges of commerce.*

This is the most correct view of the subject. The Emperor Paul granted to the Russian American Company certain exclusive privileges of commerce, — exclusive with reference to other Russian subjects; but Russia had never before *asserted* a right of sovereignty over any part of the North American Continent, and in 1799 the people of the United States had been at least for twelve years in the constant and uninterrupted enjoyment of a profitable trade with the natives of that very coast, of which the ukase of the Emperor Paul could not deprive them.

"It was in this same year, 1799, that the Russian settlement at Sitka was first made, and it was destroyed in 1802 by the natives of the country. There were, it seems, at the time of its destruction, three American seamen who perished with the rest, and a new settlement at the same place was made in 1804.

In 1808, Count Romanzoff, being then Minister of Foreign Affairs and of Commerce, addressed to Mr Harris, consul of the United States at St. Petersburg, a letter complaining of the traffic carried on by citizens of the United States with the native Islanders of the northwest coast, *instead* of trading with the Russian possessions in America. The Count stated that the Russian Company had represented this traffic as *clandestine*, by which means the savage *islanders*, in exchange for otter skins, had been furnished with fire arms and powder, with which they had destroyed a Russian fort, with the loss of several lives. He expressly disclaimed however, any disposition on the part of Russia to abridge this traffic, of the citizens of the United States, but proposed a convention by which it should be carried on *exclusively* with the agents of the Russian American Company at Kadiak, a small island near the promontory of Alaska, at least 700 miles distant from the other settlement at Sitka.

On the 4th of January, 1810, Mr Daschkoff, *chargé d'affaires*, and consul-general from Russia, renewed this proposal of a convention, and requested as an alternative that the United States should, by a legislative act prohibit the trade of their citizens with the natives of the northwest coast of America as *unlawful and irregular*, and thereby induce them to carry on the trade exclusively with the agents of the Russian American Company. The answer of the Secretary of State, dated the 5th of May, 1810, declines those proposals for reasons which were then satisfactory to the Russian Government, or to which at least no reply on their part was made. Copies of these papers and of those containing the instructions of the Minister of the United States then at St. Petersburg, and the relation of his conferences with the Chancellor of the Empire, Count Romanzoff, on this subject are herewith enclosed. By them, it will be seen that the Russian Government at that time explicitly declined the assertion of *any* boundary line upon the northwest coast, and that the

proposal of measures for confining the trade of the citizens of the United States exclusively to the Russian settlement at Kadiak and with, the agents of the Russian American Company had been made by Count Romanzoff under the impression that they would be as advantageous to the interests of the United States as to those of Russia.

It is necessary now to say that this impression was erroneous; that the traffic of the citizens of the United States with the natives of the northwest coast was neither *clandestine*, nor unlawful, nor irregular; that it had been enjoyed many years before the Russian American Company existed, and that it interfered with no lawful right or claim of Russia.

This trade has been shared also by the English, French, and Portuguese. In the prosecution of it the English settlement of Nootka Sound was made, which occasioned the differences between Great Britain and Spain in 1789 and 1790, ten years before the Russian American Company was first chartered.

It was in the prosecution of this trade that the American settlement at the mouth of the Columbia River was made in 1811, which was taken by the British during the late war, and formally restored to them on the 6th of October 1818. By the treaty of the 22nd of February, 1819, with Spain, the United States acquired all the rights of Spain north of latitude 42°; and by the third Article of the convention between the United States and Great Britain of the 20th of October 1818, it was agreed that any country that might be claimed by either party on the northwest coast of America, westward of the Stony Mountains, should, together with its harbors, bays, and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years from that date to the vessels, citizens, and subjects of the two powers, without prejudice to the claims of either party or of any other State.

You are authorised to propose an article of the same import for a term of ten years from the signature of a joint convention between the United States, Great Britain, and Russia.

The right of the United States from the forty-second to the forty-ninth parallel of latitude on the Pacific Ocean we consider as unquestionable, being founded first, on the acquisition, by the treaty of February 22nd, 1819, of all the rights of Spain; second, by the discovery of the Columbia River, first from sea, at its mouth and then by land, by Lewis and Clarke; and third, by the settlement at its mouth in 1811. This territory is to the United States of an importance which no possession in North America can be to any European nation, not only as it is but the continuity of their possessions from the Atlantic to the Pacific Ocean, but as it offers their inhabitants the means of establishing hereafter water communications from the one to the other.

It is not conceivable that any possession upon the continent of North America should be of use or importance to Russia for any other purpose than that of traffic with the natives. This was, in fact, the inducement to the formation of the Russian-American Company and to the Charter granted them by the Emperor Paul. It was the inducement to the ukase of the Emperor Alexander. By offering free and equal access for a term of years to navigation and intercourse with the natives to Russia, within the limits to which our claims are indisputable, we concede much more than we obtain. It is not to be doubted that, long before the expiration of that time, our settlement at the mouth of the Columbia River will become so considerable as to offer means of useful commercial intercourse with the Russian settlements on the islands of the northwest coast.

With regard to the territorial claim, separate from the right of traffic with the natives and from any system of colonial exclusions, we are willing to agree to the boundary line within which the Emperor Paul had granted exclusive privileges to the Russian American Company, that is to say, latitude 55°.

If the Russian Government apprehend serious inconvenience from the illicit traffic of foreigners, with their settlements on the northwest coast, it may be effectually guarded against by stipulations similar to those, a draft of which is herewith subjoined, and to which you are authorized, on the part of the United States, to agree.

As the British Ambassador at St Petersburg is authorized and instructed to negotiate likewise upon this subject, it may be proper to adjust the interests and claims of the three powers by a joint convention. Your full power is prepared accordingly.

Instructions conformable to these will be forwarded to Mr Rush, at London, with authority to communicate with the British Governement in relation to this interest, and to correspond with you concerning it, with a view to the maintenance of the rights of the United States.

I am, etc.

JOHN QUINCY ADAMS.

Now the learned Arbitrators will perceive upon that letter which is entirely instructive in reference to the views of the United States Government at that time, that the only serious and practical objection on the part of the United States Government to whatever pretensions were set up by Russia in this ukase of 1821 were two : first, that she should have extended her territorial pretensions from 54°40' where they stood under the charter to the Russian American Company of 1799 down to 51° degrees north latitude, and secondly, to her exclusion from the north-west coast of the United States citizens engaged in trade — in other words, the exclusion of the benefits of the trade on this north-western coast. The maritime pretensions contained in the ukase of 1821 were indeed alluded to and objected to, but it forms no substantial part of the objections which are so carefully urged by Mr Adams. The substance of the objections urged by Mr Adams is this, that along the north-west coast by which he means the coast extending from say, 60° north latitude down to the mouth of the Columbia River, had been for years in the enjoyment of the varions Powers — of Russia, of the United States, of Great Britain, of Spain, of Portugal : that they had all to a greater or less degree engaged in that trade ; that the United States had engaged in it from the time that it had become an independent nation, and that its right to a participation, in that trade was entirely well-founded, as Mr Adams insisted.

Now that had reference to that coast upon which I run my pointer. (Describing) It had no reference to Behring Sea or any of the islands of Behring Sea or the coast of Siberia — regions which, so far as respected their coast or any trading upon the coasts, had never been visited by the vessels of the United States, and no thought had ever been entertained of engaging in such a commerce. The United States claimed title according to this statement by Mr Adams up to the 49th degree of the present boundary of British Columbia. At that time, Great Britain and the United States, of course, were in dispute as to whom this coast belonged to, both of them claiming it, and it was not until the year 1846 that that dispute was settled by the adoption of the present boundary.

**The President.** — If you look at page 142, they speak of the 59th degree north latitude— I refer to this letter of Mr Adams which you have just read.

**Mr Carter.** — So far as prior discovery can constitute a foundation of right the papers which I have referred to prove that it belongs to

the United States as far as 59° north by the transfer to them of the rights of Spain.

Yes, that ground is indeed taken. It would be where my pointer now is.

(Indicating it on the map.)

Up to the southern boundary of Alaska, a line which would take the whole of the peninsula. That was a claim which made this territory in part a disputed one. That is the case which Mr Adams made here by these instructions. Spain is the first discoverer up to 60° of north latitude. We have her rights transferred to us; therefore by first discovery, we have a title to latitude 60°.

In the next place, we have always been engaged in trading on that coast, and have visited it continually ever since we were an independent nation; and such rights as we have springing out of trade with the coast, added to the rights of prior discovery, constitute a title on which we can make a dispute with Russia. So that we see, from letter of Mr Adams and from his instructions to the United States negotiator of the treaty, that practically the whole importance of the dispute lay in the possession of that northwest coast. That is all there was about it. There was, indeed, a sentimental assertion (I call it a sentimental assertion) that no further acquisition, no further settlement by European powers on the American continent would be permitted, but that did not amount to much, for, in that very letter, he offered to draw a boundary line with Russia at the 55th degree, which would give her exclusive possession of the north and exclusive possession of a very considerable part of this disputed region. Practically, the whole interests that were affected by this dispute centered on that Northwest Coast Trade; and I might as well here strengthen that point.

Mr Adams, you will remember, refers, in that letter of instructions, to two articles in certain well known periodicals of that time, as containting very correct information about this region. One was an article in the "Quaterly Review", and the other an article in the "*North American Review*". Now, here is an extract from the article, which is refered to, the "Quaterly Review", and it will be found on page 12 of the 1st volume of our Appendix.

> Let us examine, however, what claim Russia can reasonably set up to the territory in question. To the two shores of Behring Sea, we admit, she would have an undoubted claim, on the score of priority of discovery, that on the side of Asia having been visited by Deshnew in 1648, and that of America visited by Behring in 1741, as far down as the latitude 51° and the peaked mountain, since generally known by the name of Cape Fairweather.

That is carrying the position and claim of Russia under the right of prior discovery much further than the 60°.

> To the southward of this point, however, Russia has not the slightest claim.

Now, here is an extract from the *North American Review;* I may say,

— I do not know; but there is some evidence of it in these papers, and I think I will undertake to say that it was written by Mr William Sturgis of Boston, a very distinguished merchant of that day, of the firm of Bryant, Sturgis and Company, who carried on a very extensive trade on this very coast; and he had himself been, as a member of that house and engaged in this navigation, many years on that coast and perfectly familiar with its history and with the trade which had arisen there. This article says :

We have no doubt but Russian fur-hunters formed establishments at an early period on the Aleutian islands and neighbouring coast of the Continent; but we are equally certain that it can be clearly demonstrated that no Settlement was made eastward of Behring Bay till the one at Norfolk Sound (Sitka) in 1799.

Behring Bay is *there* [*Pointing it out on the map.*], since called Yakutat Bay.

The statements of Cook, Vancouver, Mears, Portlock, and La Pérouse prove what we readily admit that, previous to 1786, the Russians had Settlements on the Island of Kadiak and in Cook's River.

That Island of Kadiak is easily legible to the learned Arbitrators; just south of the peninsula of Alaska.

The Russians had Settlements on the Island of Kadiak and in Cook's River; but we shall take leave to use the same authorities to establish the fact that none of these Settlements extended so far east as Behring Bay.

Claret Fleurieu, in his introduction to the Voyage of Marchand, published in 1801, says. The principal object of all these voyages was the examination of that long archipelago know under the collective name of the Aleutian or Fox Islands, which the Russian charts divide into several archipelagoes under different names; of all the part of the coast which extends east and west under the parallel of 60°, and comprehends a great number of islands situated to the south of the mainland, some of which were visited and others only perceived by Behring. Lastly, of the peninsula of Alaska and of the other island situated to the north of this peninsula as far as the seventeenth degree.

It is on these Aleutian islands, and on upwards of three hundred leagues of the coast, *which extend beyond the Polar circle*, that the indefatigable Russians have form ed those numerous settlements, those factories that support the fur trade, from which the Empire of Russia derives such great advantages in its commercial concerns and exchanges with the Empire of China.

Now Sir George Simpson, the Governor in chief of the Hudson's Bay Company's territory in North America says in his narrative of a journey round the world during the years 1841 and 1842 :

In justice, however, to Russia, I have no hesitation in saying that under the recognized principles of colonization she is fully entitled to all that she holds in America.

The writer goes on to describe the discovery as far as Kadiak and states :

... No other nation having previously penetrated or even pretended to have penetrated further north than the parallel of 50° : but the Russian discoveries were distinguished by this favourable peculiarity, that they were in a great measure achieved independently of the more southerly discoveries of Spain being the result of rumours of a neighbouring continent which, in the beginning of the century the Spanish and Russian conquerors had found to be rife in Kamschatka moreover,

in the case of the Russians, discovery and possession had advanced hand in hand. The settlement of Kadiak was 24 years before Mears erected his solitary shed in Nootka Sound, and Sitka was established fully 10 or 12 years earlier than Astoria. According to this plain summary of undeniable facts, Russia had a better claim, at least down to the parallel of 56° than any other power could possibly acquire ".

The Tribunal then adjourned for a short time.

**The President.** — Mr Carter, we are ready to hear you.

**Mr Carter.** — Mr President, the diplomatic papers, especially the instructions from Mr Secretary John Quincy Adams, to the American negociator of the Treaty with Russia, and the historical evidence referred to in that letter, and other historical evidences which were alluded to by me, establish, as it seems to me, without question, that so far as the United States was concerned, her objections to the Ukase of 1831, was substantially confined to the unwarranted assertion of authority on the part of Russia as the United States deemed it to be, over the North-West Coast, where the United States had very valuable commercial interests; and it appears equally clear, that so far as concerns the possessions of Russia, north of the 60th parallel of north latitude (which includes the whole of Alaska, the whole of the Behring sea, and the Aleutian islands), the title of Russia, her right to the possession and enjoyment of those territories, was undisputed, and constituted no subject of complaint on the part of the United States; and that so far as respects the assertion of maritime dominion, contained in the Ukase of 1821, while the United States made a formal objection to it, it did not figure prominently as an objection on their part or make any considerable figure in the discussions. It was under those circumstances, and with those views on the part of the United States, and on the part of Russia, that the Treaty of 1824 was concluded; and the question now is as to the interpretation of that Treaty. Its provisions will be found on page 36 of the 1st volume of the Appendix to the American Case :

ARTICLE I

It is agreed that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed now restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

That is the important part of the treaty of 1824, so far as the present discussion is concerned; and the question is whether the terms " Pacific Ocean, or South Sea ", include Behring Sea, or exclude it? It is insisted upon, on the part of Great Britain, that it does : It is insisted upon, on the part of the United States, that it does not; and the question is : which is the more reasonable interpretation under the circumstances of the case, and in view of all the lights which can be gathered from the evidence concerning the interpretation of the parties to the treaty?

Now it is apparent at the start, that the article of the treaty admits of either interpretation upon its face. Pacific Ocean, or South Sea, may include the whole of Behring Sea, as is insisted upon by Great Britain; and, on the other hand, it may exclude it, as is insisted upon by the United States. Well, what is the consequence of accepting the interpretation insisted upon by Great Britain? The consequence is that the United States is, by the terms of that treaty, permitted to land on all the coasts of the Pacific Ocean, including Behring Sea, under the supposed dominion of Russia including the whole of the coast of Siberia, the whole of the coast of Alaska, and all the islands in the Behring Sea. That is the consequence of that interpretation. On the other hand, if the interpretation insisted upon by the United States is correct, the phrase " Pacific Ocean ", only applies to that part of the Pacific Ocean, so to speak, which is south of the Aleutian Islands, and, particularly, therefore, applies only to this disputed territority along here (pointing it out on the map). Its application on the other side would be extremely limited. Well, now we have to say that the interpretation insisted upon by Great Britain is in a high degree improbable, and unreasonable. Why? It gives up at once to the United States, what the United States never asked for, and that is, a right to resort to the coasts of Behring Sea, and the islands in Behring Sea. It surrenders that important right to the United States without any consideration, so far as I am able to see.

Why should we suppose that Russia intended in this negociation to give to the United States a right to resort to her coasts and her islands which the United States never asked for? Why should we suppose that it was the intention on the part of Russia to abandon a pretention the propriety of which the United States never denied? My first point, therefore, is that the interpretation insisted upon by Great Britain is improbable, and unreasonable on its face; and that we should not accept it unless the language of the Treaty is so explicit as to compel that acceptance.

Now when we turn to the language of the Treaty, we find reason for supposing at once that the term " Pacific Ocean ", was not intended to cover so broad an acceptance. The language is :

> It is agreed that in any part of the great Ocean, commonly called the Pacific Ocean or the South Sea *commonly called* the Pacific Ocean or South sea.

Those words " commonly called " are not destitute of signification. They were not inserted here, as I conceive, without a purpose. Did the Pacific Ocean commonly spoken of in that age, include Behring Sea? What do we mean by the term " commonly called "? Do we mean the meaning assigned to it by some distinguished geographers who have divided the earth and the waters which cover the earth into separate divisions? Is that what is commonly meant by the term " Commonly called "? No, I imagine not. It means that which is called the " Pacific Ocean, or the south sea ", by ordinary common men engaged in fishing enterprise or engaged in navigating; and I apprehend in that age if seamen, naviga-

tors, masters of vessels, and commercial firms engaged in doing business in resorting to that sea with their vessels, were to be asked what they meant by the " Pacific Ocean " — whether it included Behring sea or not — we know if they had an enterprise in Behring Sea they would say so ; if they hand an enterprise to the north-west coast they would say so, to the northern part of the Pacific Ocean. Therefore I think it is intended, by the use of the words " commonly called ", to limit the term " Pacific Ocean " to that which according to the common usage among men of that time, who were in the habit of using that term, by means of their business and other relations to limit it to their meaning of the word.

Then, in the next place, let us look at the Maps of that date. Now there are a multitude of them alluded to here on both sides. As to the majority of them — I think I may say nearly all of them — I do not wish to be understood, however, as making any very positive assertion on that point, for I have not made an accurate study of them — but as to the vast majority of them, Behring Sea is invariably represented as a sea by itself separate and distinct from the Pacific Ocean — some times called " Northern Sea "; sometimes, and more frequently, called the " Sea of Kamschatka "; but generally represented on all the maps of the time as a sea separate by itself. I cannot help thinking, therefore, that if it was the intention of these Governments to embrace, by the terms of this Treaty, the coasts, and the islands of Behring sea, they would have used some language expressly and unequivocally indicating that; and that we should not infer that Russia has made a surrender without consideration of her unquestionable rights along the shores of the whole of Behring sea unless language is found in the Treaty unequivocally importing that fact.

So much on the face of the Treaty itself, and it seems to me that the argument is very strong — I will not say it is absolutely conclusive, because it is a subject upon which an argument can be made on both sides — but it seems to me the argument which limits the phrase " Great Ocean ", commonly called the " Pacific Ocean " or " South Sea ", was, in the minds of these agreeing Governments, limited to the Pacific Ocean, south of Alaska, and of the Aleutian Islands, and excluded the Behring Sea.

Now, however, I come to a point which seems to me to be, quite conclusive upon this question. The learned Arbitrators will bear in mind that I am now discussing the meaning of these words in the American Treaty — not in the British Treaty ; that is a matter for subsequent consideration. I take the Treaty which was first named, and I come to certain considerations now which seem to me to be quite conclusive on the subject. After this Treaty had been finally concluded, but before it had been ratified, its terms came to the knowledge of this Russian American Company, who had, by grant from Russia, the exclusive rights to all the industries in Behring Sea. That Company perceived, or thought it perceived, that it might be apparent at some time on the part of the United States, or its citizens, that, by the language of the Treaty, the Russian

industries in Behring Sea were, to some extent, thrown open to the citizens of the United States; and they subsequently made that apprehension of theirs the subject of communication to their own Government; and I call attention to a letter from the Minister of Finance of the Russian Government to the Board of Administration of the Russian American Company. This is found at page 155 of the Counter Case of the United States.

This was written from St-Petersburg, sept. 4th, 1824.

The communication of June 12, 1824, presented to me by the directors of the Company, containing their remarks on the consequences which may result from the ratification of the convention concluded April 5, 1824, between our Court and the North American Republic was communicated to me at that time in the original to the minister in charge of the Ministry of Foreign Affairs. Having now received from him the information that the recorded protocol of the proceedings of the special committee which examined the subject by imperial order has received the full and entire approval of His Imperial Majesty, I think it necessary to communicate to the board of administration of the Russian American Company, for their information, copies of the above mentioned communication of count Nesselrode to me, and also the proceedings of July 21, 1824, inclosed in it, together with a draft of a communication to me, prepared by His Excellency : which was also read in the above-named committee and was left unsigned after it had been given final consideration.

From these documents the board will see that, for the avoidance of all misunderstandings in the execution of the above-mentioned convention, and in conformity with the desire of the company, the necessary instructions have already been given to Baron Tuyll, our minister at Washington, to the effect that the northwestern coast of America, along the extent of which, by the provisions of the convention, free trading and fishing are permitted to subjects of the North American States, extends from 54°40' northwards to Yakutat (Behring's) Bay.

That shows the interpretation placed by the Government of Russia at that time, and that encloses the abstract of the communication from Count Nesselrode, Minister of Foreign affairs to the Minister of Finance. Count Nesselrode, as the learned Arbitrators will remember, had to do with the negotiation and conclusion of the Treaty. Now that communication is quite a long one. I shall not read the whole of it, but I call attention to the concluding passages of it on page 158 :

But seeing on the other hand.

**Sir Charles Russell.** — I beg my learned friend's pardon. As this is the first occasion upon which a document has been referred to, the correctness of which is impugned, it is well that I should call the attention of the Tribunal at once to it. My friend has read as part of the real document the words :

Together with a draft of a communication to me prepared by His Excellency; which was also read in the above-named Committee, and was left unsigned after it had been given final consideration.

That is an interpolated passage and is not in the original. No pardon I beg my friend's pardon — I misunderstood it. Those words are omitted in the first translation; but are in the origina.

**Mr Justice Harlan.** — The heading of the page is " Amended Translations. "

**Sir Charles Russell.** — I thonght that what my friend read was the original one in the Counter case, not the amended translation.

**Mr Justice Harlan.** — On the top of the page the Counter case. from which Mr Carter read, it says " Amended Translations ".

**Sir Charles Russell.** — That is so.

**Mr Carter.** — Does that dispose of the objection?

**Sir Charles Russell.** — It does.

**Mr Carter.** — Now of the draft that is contained in that, I will read only the concluding passages. It says :

But seeing on the other hand that the restrictions stated in the opinion of the Minister of Finance, and State Councillor Drushinin put an end to all the complaints of the American Company, the majority of the members of the Committee have found it necessary to investigate the nature of these restrictions in order to as certain how far it is possible to insist upon them without prejudice to the rights and advantages accruing from the treaty of April 5-17.

That communication on the part of the officers of the Russian Government intimates the interpretation of the Treaty which I have suggested to the Tribunal, that, so far as regards places north of latitude 60° or thereabouts — it is sometimes put at 59° some minutes and at other times 60° — so far as respects the places north of that latitude, they were in regions which were never the subject of dispute, and therefore the exclusive right of Russia to them is not affected by the Treaty. But so far as relates to regions south of that latitude, they belong to a territory which was the subject of dispute, and which therefore came under the provisions of that Treaty. It ought also to have been stated to the Arbitrators, as another ground for supporting that interpretation of the Treaty which I have insisted on, that the other important articles of the Treaty, II, III, IV, all refer manifestly and plainly to the north-western coast. That is another reason for limiting the meaning of the phrase " Pacific Ocean " to that part of the Pacific ocean which is south of Behring Sea. We see from these papers that I have read emanating from the Russian Government, the understanding, and the interpretation it put upon the provisions of this Treaty even prior to the time when it had been ratified.

**Mr Justice Harlan.** — What bearing upon your argument, does the paragraph in the preceding page have? page 157.

**Mr Carter.** — Yes, I should have read that. On page 157, paragraph 7 of the proceedings of the conference held July 21st 1824.

That as the Sovereignty of Russia over the Coast of Siberia and the Aleutian Islands has long been admitted by all the powers; it follows that the said Coasts and Islands cannot be alluded to in the Articles of the said Treaty, which refers only to the disputed territory on the northwest coast of America and to the adjacent Islands; that, even supposing the contrary, Russia has established permanent settlements, not only on the coasts of Siberia but also on the Aleutian group of Islands; hence America subjects could not by virtue of the second article of the Treaty of April 5-17 land at the maritime places there nor carry on sailing or fishing without the permission of our Commandants or Governors. Moreover, the Coasts of Siberia

and the Aleutian islands of which alone mention is made in the first Article of the Treaty, but by the Northern Ocean and the seas of Kamschatka and Okhotsk which form no part of the Southern sea in any known map or in any geography.

**Mr Phelps.** — That was on July 21st 1824 immediately after the Treaty.

**The President.** — Those are the proceedings of the conference of Russian Officials.

**Mr Carter.** — Yes those are the proceedings of the conference of Russian Officials.

**The President.** — That is merely the Russian view — the Russian statement.

**Mr Carter.** — That is all.

**The President.** — There is nothing international in this.

**Mr Carter.** — There is nothing international in this. I only cite it as evidence of the view entertained by the Russian Government, but not as an interpretation by both Governments. But the learned Arbitrators will now perceive from the paper I am about to read that those very views were brought to the attention of the American Government, and, as I conceive, acquiesced in, and that before the ratification of the Treaty. It will be remembered that in the documents from which I have just read allusion was made to instructions which had been given to Baron Tuyll the Russian Minister at Washington to bring this matter to the attention of the American Government. Mr Adams was at that time Secretary of State and there is recorded in his diary of December 6th 1824 the fact that an interview between him and Baron Tuyll on this subject and in these words :

This is to be found at page 276 of the American Appendix, volume I :

" 6th Monday : Baron Tuyl, the Russian Minister, wrote me a note requesting an immediate interview, in consequence of instructions received yesterday from his court. He came, and, after intimating that he was under some embarrassment in executing his instructions, said that the Russian American Company, upon learning the purport of the North West Coast Convention — that is this Treaty. — Concluded last June by Mr Middleton, were extremely dissatisfied (*a jeté de hauts cris*), and by means of their influence had prevailed upon his Government to send him these instructions upon two points. One was that he should deliver, upon the exchange of the ratifications of the Convention, an explanatory note purporting that the Russian Government did not understand that the Convention would give liberty to the citizens of the United States to trade on the coast of Siberia and Aleutian islands. The other was to propose a modification of the Convention, by which our vessels should be prohibited from trading on the North West Coast, North of latitude 57°. With regard to the former of these points he left with me a minute in writing. "

Now, the minute in writing is subjoined, but I will not read it now, but turn to page 277 to continue.

**Sir Charles Russell.** — I think it is important.

**Mr Carter.** — I will read it before I get through. I will continue the extract from Mr Adams's diary. It says.

I told Baron Tuyl that we should be disposed to do every thing, to accommodate

the views of his Government, that was in our power, but that a modification of the Convention *could* be made not otherwise than by a new Convention; and that the construction of the Convention as concluded, belonged to other Departments of the Government, for which the Executive had no authority to stipulate... I added that the Convention would be submitted, immediately, to the Senate that if anything affecting its construction or still more, modifying its meaning, were to be presented on the part of the Russian Government, before or at the exchange of the ratifications, it must be laid before the Senate, and could have no other possible effect than of starting doubts, and, perhaps, hesitation, in that body, and of favoring the views of those, if such there were, who might wish to defeat the ratification itself of the Convention.

... If therefore, he would permit me to suggest to him what I thought would be his best course it would be to wait for the exchange of the ratifications, and make it purely and simply; and that, afterwards, if the instructions of his Government were imperative, he might present the note to which I now informed him what would be, in substance, my answer. It necessarily could not be otherewise.

But if his instructions left it discretionary with him, he would do still better to inform his government of the state of things here, of the purport of our conference, and of what my answer must be if he should present the note. I believed his court would then deem it best that he should not present the note atall. *Their apprehension had been excited by an interest not very friendly to the good understanding between the United States and Russia. Our merchants would not go to trouble the Russians on the coasts of Siberia, or north of the 17 th degree of latitude, and it was wisest not to put such fancies into their heads* at least the Imperial Gouvernment might wait to see the operation of the convention before taking any farther step, and *I was confident they would hear no complaint resulting from it.* If they should, then would be the time for adjusting the construction or negotiating a modification of the convention.

Now the explanatory note which Baron Tuyll mentioned, which he contemplated filing, I will now read :

Explanatory note to be presented to the government of the United States, with a view to removing, with more certainty, all occasion for future discussions; by means of which note it will be seen that *the Aleutian Islands, the Coast, of Siberia, and the possessions in general on the north west Coast of America to* 59° 30' *of north latitude* are positively excepted from the liberty of hunting, fishing, and commerce, stipulated in favor of citizens of the United States, for ten years.

This seems to be only a natural consequence of the stipulations agreed upon, for the coast of Siberia are washed by the Sea of Okhotsk, the Sea of Kamschatka, and the Icy Sea, *and not by the South Sea* mentioned in the Convention of April 5-17 [1824]. The Aleutian islands are also washed by the Sea of Kamschatka, or Northern Ocean.

*It is not the intention of Russia to impede the free navigation of the Pacific Ocean.*

She would be satisfied with causing to be reconized as well understood and placed beyond all manner of doubt, the principle that beyond 59°30' no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues. This will not prevent the reception of foreign vessels which have been damaged or beaten by storm.

That was the note which was presented. Now I will read a further extract from Mr Adams's Diary after he had communicated to the Baron his suggestion :

The Baron said that these ideas had occurred to himself; that he had made this application in pursuance of his instructions, but he was aware of the distribution of powers in our Constitution and of the incompetency of the Executive to adjust

such questions. He would therefore wait for the exchange of the ratifications without presenting his note, and reserve for future consideration whether to present it shortly afterwards or to inform his Court of what he has done and ask their further instructions upon what he shall definitely do on the subject.

**Sir Charles Russell.** — There is something important in the passage following that you do not give there, I think. The passage is this :

He therefore requested me to consider what had now passed between us as if it had not taken place (*non avenu*) to which I readily assented, assuring him, as I had done heretofore, that the President had the highest personal confidence in him, and in his exertions to foster the harmony between the two countries. I reported immediately to the President the substance of his conversation, and he concurred in the propriety of the Baron's final determination.

**Mr Justice Harlan.** — What are you reading from, Sir Charles?

**Sir Charles Russell.** — Page 57 of the British Counter-case.

**Sir Richard Webster.** — It is the continuation to Baron Tuyll's note.

**Sir Charles Russell.** — It comes next after the passage at which my friend stops.

**Mr Carter.** — I am glad my friend has read that. Mr Blaine recognized the same at the close of page 277. These extracts I have read are embraced in a latter of Mr Blaine, and upon giving them, he says this :

As Baron Tuyl surrendered his opinions to the superior judgment of Mr Adams the ratifications of the treaty were exchanged on the 11th day of January, and on the following day the treaty was formally proclaimed. A fortnight later, on January 25th 1875, Baron Tuyl, following the instructions of his Government, filed his note in the Department of State.

**Sir Charles Russell.** — Is there any evidence of that? I do not find any evidence of that. I do not find that any note was filed in the Department of the State.

**Mr Carter.** — We have got it. There is the note.

**Sir Charles Russell.** — Not filed with you. It is filed with Russia.

**Mr Foster.** — I understand we have furnished the British Agent with a copy of that.

**Mr Carter.** — So I understand — a copy of that note as it stands on the files of the department of the State. The importance of the transaction, bearing on the interpretation of the treaty, and what is the substance of it, was that members of the Russian Government looking to the terms of this treaty, not as yet ratified, had an apprehension that it might be maintained that some of their exclusion rights to the industry pursued in Behring Sea, would be thrown open to citizens of the United States, and remonstrated on that subject to their own Government. The view which the Russian Government took in regard to the matter in answer to these remonstrances appears to have been : " The provisions of the treaty properly interpreted do not affect Behring Sea; and the exclusive rights which the Russian American Company enjoyed there prior to the treaty they will still continue to enjoy, but in order to make that certain we

instruct our minister at Washington to make representations to the American Government. "

In pursuance of that Baron Tuyll comes to the Secretary of State, Mr Adams, states the apprehensions on the part of the Russian Government, and shows a note which he is requested to put on the file in a State department and which now asserts, as the proper interpretation of the term that " Pacific Ocean ", does not include Behring Sea. The formal representative of the Russian Government thus, in the most positure manner, states to the Government of the United States, " According to our interpretation, this Treaty which is about to be ratified will not include Behring Sea, but we wish to have that matter certainly determined and if necessary by some alteration of its provisions ". What is the reply of Mr Adams to the Minister — that the interpretation was ill-founded? No. Does he contest it all? No. Does he state that the American Government has a different view with reference to it? No nothing of the sort. He says there that what that Treaty means must, according to American law be determined by another department of Government, namely, the judicial department; that it is, a judicial question. In the next place, that if Baron Tuyll should deliver such a paper as that to the American Government, it would have to go before the Senate, and it might raise embarassing questions there, and possibly stand in the way of a ratification of the Treaty. He further suggests to Baron Tuyll the point is of no pratical consequence; our people will never go there; there is no danger of that, and if you say anything about it, the effect may be to put fancies into their heads which otherwise they would not entertain; your best course is to say nothing about it, and to let this Treaty be ratified as it stands; if after that your own Government insist that you shall do something further such as the filing this note, why then you can do that; but I tell you beforehand what my answer to that note must be that it raises a question respecting the interpretation of the Treaty, and that will have to be settled, not by the Executive, but by the Judicial Department of the American Government. That is Mr Adams answer to it.

Now I cannot of help thinking that Mr Adams and the American Government would be justly subjected to the charge of bad faith, if they had made such an answer as that, with the conviction upon their minds that the interpretation of the Treaty was otherwise, or with an intention upon their minds to afterwards assert any different interpretation of the Treaty than that which Baron Tuyll suggested.

I do not think that we could relieve Mr Adams or the American Government from the imputation of bad faith if they then believed that the Treaty fairly bore a different construction, that they did not frankly and candidly say so to Baron Tuyll. Now what occurred afterwards, however? Baron Tuyll took the advice thus tendered to him by Mr Adams, acted upon it, and said. " I will not file this note until this Treaty is ratified; I will await its ratification, and then I will not file it unless my Government tell me so ". He did wait; His Government it would appear,

did direct him to file the note, and he did put on file, a few days after that, with the American Government, a note on the part of the Russian Government which explicitly stated their interpretation of it. That note was unanswered. If the American Government was ever at any time to dispute the interpretation thus put upon the Treaty by the Government of Russia, it was their time to answer it *then;* and if they did not do it then, they would be precluded afterwards from asserting a different interpretation of it. I cannot but think, therefore, that these transactions subsequent to the actual conclusion of the Treaty, go very far in my mind they seem to be conclusive — in favor of the interpretation suggested *then*, and insisted upon *then* by the Russian Government, and which is *now* insisted upon by the Government of the United States.

**The President.** — Do you not think the silence of Mr Adams was significant in refusing to give a written answer and, consequently, a written rejoinder, and written acquiescence to the views of Baron Tuyll?

It is rather unusual not to answer a diplomatie communication unlefs there is a reason for it.

**Mr Carter.** — It was significant, and significant in the way in which I have stated. It said to Baron Tuyll it is not the province of the Executive Departm ·nt of the Government of which I am a representative, to put a construction on this Treaty; if I should attempt to give you my construction of it, it would not be binding, because at some future time it might become a judicial question, and the Supreme Court of the United States will be called upon to give a construction; but he then goes on to encourage him to take no step to establish his instructions. He goes on to encourage him to take that course, and that I must concede would not have been consistent with good faith on the part of Mr Adams, if he thought that perhaps there was any probability that at any time the American Government would set up a contrary interpretation.

**The President.** — Do you not think the silence of Mr Adams left the question open.

**Mr Carter.** — You might say that, technically, it left it open; but I am speaking of it now not as a technical question, but as a question of good faith; a question of frankness and candour among Diplomatists a question of frankness and candour among representatives of two great nations, one approaching the other in that way, bound of course, by obligation. Mr Adams did not put himself on this ground and say " Well, here you must take care of yourself; you must not interpret either my language or my silence beyond what it may immediately import". He took no such attitude. He did not put Baron Tuyll upon his guard at all — he took him into his confidence atonce and said I recommend you to take *this* course, not *that*. That attitude of confidence was not consistent with good faith on the part of Mr Adams if he himself did not really suppose, as he practically intimated, that there was no trouble on that score, and that a different interpretation to that which Baron Tuyll suggested would never be set up on the part of the United States.

So much for the American Treaty; but that does not interpret the British Treaty, and it is to that that the attention of the Tribunal is more immediately directed. The language of the British Treaty, although not precisely, is substantially the same, and is no doubt intended to be the same. The language of the first article of that Treaty is to be found on page 39 of the first volume of the American Appendix.

It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean.

**Mr Justice Harlan.** — The word "Grand" seems to be left out there. "Grand" I take it, should be in before the word "ocean" as you will see the word from the translation in French on page 41.

**Mr Carter.** — Well, I do not know.

**Mr Justice Harlan.** — You have the word "Grand" in the American Treaty with America of 1824.

**Mr Carter.** — We have not it here. I have no other evidence of what the American treaty is, and what is contained in it.

**Sir Charles Russell.** — The word in the original French is " Grand Océan ".

**Mr Carter.** — In the French original it is so. In the American original it is as it is here for aught I know.

**Mr Phelps.** — What is that point ; I do not quite understand it?

**Mr Carter.** — The omission, or supposed omission of the word "grand" before the word "ocean" in the first article of the Treaty between Great Britain and Russia.

**Mr Justice Harlan.** —There was a Treaty signed in English, was there, besides one signed in the the French language.

**Mr Carter.** — I will explain about that in a moment ; It says.

It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested, in any part of the ocean, commonly called the Pacific Ocean, nither in Navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied' in order to trade with the natives, under the restrictions and conditions specified in the following articles.

Whether the word " grand" belongs in there or not, is of no consequence in my present argument. I assume that the samething was intended by the articles in each Treaty. That was the Treaty negociated between Great Britain and Russia. Now applying the same method of interpretation which I have to that of the United States, let me say that we know of course the view with which the Russian Government entered into the negociation of that Treaty with Great Britain. They were substantially, simultaneous with the negociations with the United States, and of course the Russian Government must have approached the settlement of the controversy with Great Britain with naturally the same views as to her rights and claims as she had in approaching the Government of the United States. In reference to the views on the part of Great Britain it of

course does not follow that she had the same purposes as animated the United States negociator.

Her purposes may have been widely different from those of the United States negotiators or United States Government, but we have this fact, that in the first place the negotiation was carried on conjointly, and presumably the views of the two Governments were up to a certain point entirely alike.

But as far as the instructions of Great Britain to her Negotiators are concerned, I must freely fully admit that instead of being mainly confined, as in the case of the United States, to the question of the disputed territory on the north west coast, they placed special importance on the maritime pretensions of 100 miles over the sea. The negotiators on the part of Great Britain were instructed that was a point which they must specially and primarily attend to, and that it was of more consequence than the disputed question of territory on the North-west coast. In that respect there was a difference. But how was that difference accommodated, and how did they get along? Mr Canning, instructing Mr Stratford Canning, at St. Petersburg how to proceed on that point, stated that he was anxious — I was going to attempt a summary of that, but I think I will make use of the correspondence itself, I will not read the whole of it, it is in fine print and very long. At page 260 of the 1st Volume of the American Appendix is found a letter of instructions from Mr George Canning to Mr Stratford Canning. I suppose he was then at the Court of St. Petersburg.

It is in reference to the manner in which he shall conduct the negotiations for this Treaty. He says :

> The correspondence which has already passed upon this subject has been submitted to your perusal, and I inclose to you a copy.
>
> (1) Of the *projet* which Sir Charles Bagot was authorised to conclude and sign some months ago, and which we had every reason to expect would have been entirely satisfactory to the Russian Government.
>
> (2) Of a *contre-projet* drawn up by the Russian Plenipotentiaries, and presented to Sir Charles Bagot at their last meeting before Sir Charles Bagot's departure from St. Petersburg.
>
> (3) Of a despatch from Count Nesselrode, accompanying the transmission of the *contre-projet'* to Count Lieven.

Now further down, it is said :

> The whole negotiation grows out of the Ukase of 1821.
>
> So entirely and absolutely true is this proposition that the settlement of the limits of the respective possessions of Great Britain and Russia on the northwest coast of America was proposed by us only as a mode of facilitating the adjustement of the difference arising from the Ukase by enabling the Court of Russia, under cover of the more comprehensive arrangement, to withdraw, with less appearance of concession, the offensive pretensions of that Edict.
>
> It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the Continent of America, but the pretensions of the Russian Ukase of 1831 to exclusive dominion over the Pacific could not continue longer unrepealed without :: ·upelling us to take some measure of public and effectual remonstrance against it.

That sets forth what the particular character of their complaint against the ukase was. He then speaks of the mode in which the negotiations should be conducted, and finally he says, and I read now from the middle of page 261 : " Perhaps the simplest course, after all. "

**Sir Charles Russell.** — Would you mind beginning a little higher up?

**Mr Carter.** — Yes; where shall I begin?

**Sir Charles Russell.** — " The right of the subjects ", and so on.

**Mr Carter** :

The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged.

We do not desire that any distinct reference should be made to the Ukase of 1821, but we do feel it necessary that the statement of our right should be clear and positive, and that it should stand forth in the Convention in the place which properly belongs to it, as a plain and substantive stipulation, and not be brought in as an incidental consequence of other arrangements to which we attach comparatively little importance.

This stipulation stands in the front of the Convention concluded between Russia and the United States of America ; and we see no reason why upon similar claims we should obtain exactly the like satisfaction.

For reasons of the same nature we cannot consent that the liberty of navigation through Behring's Straits should be stated in the Treaty as a boon from Russia.

The tendency of such a statement would be to give countenance to those claims of exclusive juridiction against which we, on our own behalf, and on that of the whole civilized world, protest.

No specification of this sort is found in the Convention with the United States of America, and yet it cannot be doubted that the Americans consider themselves as secured in the right of navigating, Behring's Straits and the sea beyond them.

It cannot be expected that England should receive as a boon that which the United States hold as a right so unquestionable as not to be worth recording.

Perhaps the simplest course after all will be to substitue for all that part of the projet' and contre projet' which relates to maritime rights and to navigation, the first two articles of the Convention already concluded by the Court of St. Petersburg with the United States of America, in the order in which they stand in that Convention.

Russia cannot mean to give to the United States of America what she withholds from us anything that she has consented to give to the United States.

There are his instructions to the Representatives of the Government of Great Britain in St. Petersburg.

**Mr Justice Harlan.** — Let me interrupt you just a moment, Mr Carter, to call your attention to the English translation of the Treaty between Russia and Great Britain of 1825. I see the translation in the British Case accords with the translation in the United States Case of the same Treaty.

**Mr Carter.** — Yes, very likely it may be right.

**Sir Charles Russell.** — The word " Great " you mean?

**Mr Justice Harlan.** — Yes.

**Sir Charles Russell.** — The word " Great" is omitted too.

**Mr Justice Harlan.** — I did not know whether it was omitted or whether there were two Treaties, one signed in English and one in French, or whether one was a translation.

**Sir Charles Russell.** — No, — the English is a translation.

**Mr Justice Harlan.** — I mean if there is an error in the translation both sides have committed the error too, — the word " Great " is left out in the original.

**Mr Carter.** — There is one in Russian too, I believe.

**Mr Foster.** — No, the Russians used the French language, the Americans the English.

**Sir Charles Russell.** — There may have been one in English and one in French.

**Mr Foster.** — But both are originals.

**Mr Carter.** — Is there anything more the learned Arbitrator wishes to know on this?

**Mr Justice Harlan.** — No.

**Mr Carter.** — Then I will resume.

The English Minister of Foreign Affairs instructs the Representative of the British Government in Saint-Petersburg who is engaged in negotiating the Treaty to carry out this object which Great Britain has in view of displacing the assumption of Russian dominion in Behring sea, but to carry it out by adopting, if he can, the first two Articles of the American Treaty, thus avoiding any discussion with the Government of Russia in respect to its pretensions in the Ukase of 1821. That was done, and there appears to have been no further discussion in reference to it.

Now, what is the consequence of that as a matter of interpretation? The British Government says whatever our contentions are upon this point we are satisfied, to take the agreement which you have made with the United States as a settlement; whatever that agreement is we are satisfied to take for ourselves. We have seen it, we are satisfied with it and we are satisfied to take it for ourselves. In thus accepting the provisions of the American Treaty, I respectfully submit to this Tribunal that they must accept the interpretation ot the American Treaty with Russia, as it was understood by both Powers, and what that interpretation was I think I have already shewn to this body.

**The President.** — Do not you think that Mr Canning understood it otherwise than you have explained it to us — He says first when the right of free navigation has been questioned it must be duly asserted I do not exactly remember the passage.

**Mr Carter.** — Yes, he says that very explicitly.

**The President.** — He says " If you will give us the text which you have given to the United States we will be satisfied" and he seems to imply the right of British ships to navigate freely in the Behring sea and across the Behring Straits is implied in the American Treaty.

**Mr Carter.** — So he thought undoubtedly.

**The President.** — I think he thought so.

**Mr Carter.** — I think he thought so and he told the British Minister in St-Petersburg so, but he did not tell the Russian Government so.

**The President.** — He made a mistake then, do you say?

**Mr Carter.** — I do not say so, except that he made a mistake in that he did not gain the object that he had in view.

**The President.** — You say he did not understand the American Treaty or construe it as you construe it?

**Mr Carter.** — He did not, and he made a mistake in supposing that the American Treaty would gain the object he had in view, if he supposed the American Treaty was according to the interpretation which the Russian and American Governments would put upon it, that would not answer his purpose, but not having communicated that to the Russian Government, and a settlement having been proposed with the Russian Government by adopting the first two articles of the American Treaty without making any interpretation of them, — adopting them as they stood, — I submit that in adopting that agreement between the United States and Russia, the interpretation of the United States and Russia was adopted with it. If I have succeeded in shewing that according to the interpretation of the United States and Russia, the " Pacific Ocean " or " South Sea " did not include the Behring Sea in the American Treaty, it no more included it in the British Treaty.

**Lord Hannen.** — Would you say that, Mr Carter, if the correspondence between the English Government and the Russian Government shewed that a different interpretation had been put upon the words : " the Pacific Ocean "?

**Mr Carter.** — I beg your Lordship's pardon.

**Lord Hannen.** — Would you say the English Government was bound by the interpretation which you say had been put upon it by the Russian and American Governments if the correspondence between the English Government the Russian Government shewed that they understood the words " Pacific Ocean " in a different sense?

**Mr Carter.** — No, my Lord, I would not in that case. If there was evidence here tending to shew that the Russian Government and the Government of Great Britain, in the course of that negotiation put an interpretation upon these very terms different from what Russia and the United States had put upon them, why then I should say they must be interpreted according to the significance in which they were understood by the Governments of Great Britain and Russia. But I have not myself discovered any evidence here tending to shew that the terms of this Treaty were understood by the Russian Government, and the government of Great Britain differently from what they were by the Government of the United States.

Now, something has been said here about this Treaty. Something has been said to the effect that the language of this Treaty as contained in the French original, and in the English original is different.

It may be so what I mean to say is that nothing can be claimed as between those two documents, — one cannot be claimed to have any superiority over the other. The treaty was drawn up in both languages and signed in both languages and if the American is to be regarded as a

translation of the French, it is a translation which is incontestable as between the parties as being a correct one, because it bears the signatures of both.

**Sir Charles Russell.** — I do not think there is any material difference between them.

**Mr Carter.** — Probably not.

Speaking of the subject of translations, it brings to my mind a matter which has not heretofore been made the subject of discussion at all, and that is the erroneous translation of Russian documents which were originally incorporated into the American case. The learned Arbitrators will observe that I have in no part of my argument made the slightest reference to them or made any use of them whatever. It is for this reason. When we first discovered to our infinite surprise that we had been imposed upon in some inexplicable manner by a person we had employed to translate these documents and who had made translations of them indisputably fraudulent, because there were interpolations contained in them for which there was no corresponding passage in the original, — when we found that out why of course the question arose: what are we to do with these papers? » They must be corrected in some form. Very fortunately for us, though I know my learned friends would not have supposed that we were in any manner chargeable with such fraudulent translations, but I say very fortunately for the United States they had incorporated into the same book, that is their original case which contained these erroneous translations, the correct original Russian documents, and of course we had put it into the power of our adversaries to convict us of any misinterpretation or mistranslation which might have been given to those documents. We were scarcely the less mortified on that account, and conceived it to be the best course on the whole to withdraw the papers from the case so that no allusion need be made to them. They never were at any time a source of any very important evidence on our part, nor did they constitute any means of considerable weight in establishing any portion of our case. We therefore wholly withdrew them, and it is unnecessary to say anything further in regard to them. What motive this individual may have had in thus imposing upon us it is difficult for me to say; his avowed motive was he wanted to recommend himself to us by shewing he had found in these Russian documents which were a mystery to everybody else, something very much in our favour.

It is unnecessary to comment on that. That explanation has not been wholly satisfactory to us; but we have never been able to explain the reason on which such a fraud as this was attempted.

I have now concluded what I have to say in reference to the interpretation of this treaty; and I submit, upon the views that I have presented, that the interpretation of Mr Blaine, which limits the meaning of Pacific Ocean or South Sea to so much of the Great Pacific Ocean as is south of the Alaskan Peninsula and of the Aleutian chain of islands is the correct one. What part does that play in our present pretensions here? Does

it demonstrate our claim completely? Not at all; and suppose we failed in establishing our interpretation and the Government of Great Britain should succeed in establishing theirs to the satisfaction of this body, would it establish their part of the case? Not at all. It has only a remote connection; but, still, a not wholly unimportant one. It operates in a manner to confirm, by the evidence of long possession and long acquiescence, those rights to the seals fishery in the Behring Sea which we have asserted at a very early period and substantially claims in regard to them; and the use we make of the Russian pretensions and our acquisition of them in our argument is substantially this.

First, the sealing industry on the Pribilof Islands, having been established prior to 1821, was one of the industries to which Russia had, by the ukase in question, asserted an exclusive right, and, to defend which, she claimed the right to exercise authority over a part of the high seas adjoining her shores.

Secondly, these rights were not abandoned, displaced or modified by the Treaties of 1824 and 1825, and, not being abandoned or modified by those Treaties, are fairly to be regarded as having then, and by those Treaties been assented to by the United States and Great Britain.

Third, the subsequent abstention by Great Britain, the United States and all other nations, and of the citizens of other nations, to disturb Russia or her successors, the United States, in the enjoyment of this sealing industry down to the year 1883, — a period of more than 60 years, — is additional and satisfactory evidence of such acquiescence.

Fourth, after an acquiescence of this character for so long a period, it is not competent for Great Britain to deny the existence of the right or the propriety of the defensive regulations necessary to its preservation.

The Arbitrators will perceive, therefore, that the use which the United States makes of this begins at the time of the ukase, proceeds upon the assertion that Russia assumed an exclusive right to this industry at that time; that that right, so far as it related to Behring Sea, and of course to the Pribilof islands was not disturbed or displaced by the Treaties of 1824 and 1825, and, not being displaced, was inferentially, and by a very strong implication, acceded to, and acquiesced in. Next, that implied acquiescence thus fairly derived from the conduct of these several Governments, is further confirmed by a uniform long continued acquiescence of 60 years down to the year 1883, during which no nation and no people of any nation, have ever undertaken to disturb or invade the exclusive right and proprietorship of Russia in this sealing industry. Those facts and circumstances, though we do not conceive them to be material or vital in this controversy, that is they are not so material as to be vital, yet have a material and an important bearing.

Now then, I want to explain to the Tribunal what our view is of the bearing of these arguments which I have laid before you upon the answer to the first question in the Treaty, and I must call to your minds again the distinction which I have heretofore attempted to draw between the

exercise by a nation of sovereign jurisdiction over the high seas, a sovereign jurisdiction of a character which makes the high seas over which such jurisdiction is attempted to be extended a part of the territory of the nation giving the nation an exclusive power of legislation over it, — a difference between an assertion of such a right as that, and the assertion of a right to exercise acts of force on the high seas for the purpose of protecting a property or an industry of a people. One of them being an assertion of sovereign jurisdiction, the other no assertion of sovereign jurisdiction at all, but simply a right of self protection and self defence which a nation, acting as an individual, always and at all times has.

Now I have stated that there was some confusion in the minds of jurists and Text-writers in reference to that distinction. The same confusion will be found in the language of this Treaty which draws up the questions which are submitted to the Tribunal. I refer the arbitrators to article VI of the Treaty which found in page 3 of the original case.

In deciding the matters submitted to the Arbitration, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points to wit :

I. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the Seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States :

Now, at first reading, it might be supposed that, by the term " exclusive jurisdiction ", sovereign jurisdiction was intended, and not a right to defend property, or an industry by self defensive measures. That might be thought, at first blush, to be intended by the language of that first section ; and yet I am inclined to think that it was not the intention of it, but that what was in the minds of the authors of this Article was a power to defend a property interest by defensive Regulations ; for you will observe that they couple that language " exclusive jurisdiction " and " what exclusive rights in the seal fisheries therein " "Exclusive jurisdiction in the Sea now known as the Behring Sea and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States ?" Those two things, the jurisdiction and rights in the seal fisheries are blended together, and blended together inseparably ; and what was really in the minds of the Authors of the Treaty was the question : What rights in the Seal Fisheries did Russia possess and what rights to defend them by the exercise of authority over the sea ?

The next question, N° 2, is :

How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain ?

There you have a distinct recognition that what is in the winds of the framers of this Treaty was nothing but rights in seal fisheries, Those rights in seal fisheries might involve indeed a right to exercice an exceptional authority on the sea. It might involve that, but only as a means

of protection. We perceive that, by the second section, these claims of jurisdiction are confined to claims to jurisdiction as to seal fisheries. "Jurisdiction" means authority and power there. It means claims to exercise power on the high seas in relation to the seal fisheries.

Then N° 3.

Was the body of water now known as the Behring's Sea included in the phrase Pacific Ocean, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

That clause does not require any comment.

Then N° 4.

Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring's Sea east of the water boundary in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

There, again, the rights of Russia as to jusrisdiction and as to the seal fisheries are coupled together. They are rights of jurisdiction only so far as the protection of the seal fisheries requires the exercise of something which they choose to call a jurisdiction.

Then N° 5.

Has the United States any right, and, if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring's Sea when such seals are found outside the ordinary three mile limit?

Apparently, that puts a question not of jurisdiction at all; but merely a question of property. But the Arbitrators will observe that it is a question of property when such seals are found outside the ordinary three mile limit. And, of course, property out there necessarily supposes some power or authority to protect it there; and, therefore, includes the question of jurisdiction.

Article 7 following that says:

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States.

Well, I rather think that article 7 regards all the five Questions as properly describable as questions of exclusive jurisdiction, or contemplates them as such.

It will, therefore, be seen that this confusion, between these two subjects, has found its way into the draft of this Treaty.

But now, having concluded my argument in relation to the rights of jurisdiction acquired by Russia in Behring Sea, as it is called, I wish to state to the learned Arbitrators how those views bear on the answers which are to be given to the first four questions submitted to the Tribunal by the Treaty: and in our view these are the answers which should be given to them. To the first question:

What exclusive jurisdiction in the sea now known as the Behring's Sea, and what

exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States.

We think the answer should be thus :

First, Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Behring Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1821, assert and enforce an exclusive right in the " seal fisheries " in said sea, and also asserted and enforced the right to protect her interest in said " fisheries " and her exclusive interests in other industries established and maintained by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her trade with her colonial establishments upon said islands and shores, by establishing prohibitive regulations interdicting all foreign vessels, except in certain specified instances, from approaching said islands and shores nearer than 100 miles. 2nd The claims of Russia above mentioned.

This is the answer to the second question.

How far were these claims of jurisdiction as to the sea fisheries recognized and conceded by Great Britain?

The claims of Russia above mentioned as to the seal fisheries in Behring Sea were at all times from the first assertion there of by Russia down to the time of the cession to the United States recognized and acquiesced in by Great Britain.

Then as to the third question :

The body of water now known as Behring Sea was not included in the phrase " Pacific Ocean " as used in the treaty of 1825 between Great Britain and Russia, and after that Treaty Russia continued to hold and to exercise exclusively a prior right in the fur seals resorting to the Pribilof Islands, and to the fur sealing and other industries established by her on the shores and islands above mentioned, and to all trading with her colonial establishments on the said shores and islands, with the further right of protecting by the exercise of necessary and reasonable force over Behring Sea, the said seals, industries, and colonial trade from any invasion by citizens of other nations tending to the destruction or injury thereof.

And the answer to the fourth question is as follows :

All the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between the United States and Russia of the 30th March 1867 did pass unimpaired to the United States under that treaty.

The fifth question which is :

Have the United States any right and if so what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three mile limit.

I have treated as one embracing the matter particularly to the discussion of the question of property interest, to which I now proceed. I am glad to pass from these questions of interpretation of Treaties concluded half a century ago — from questions which involve discussions as to the Acts of Governments of which we have no certain evidence — in short I am glad to dismiss things which call into consideration and debate doubtful questions and recur to rights which rest on fundamental principles. I approach with satisfaction a stage of this debate where I have an opportunity for the first time of putting the claims of the United States upon a basis which I feel to be impregnable, I mean the basis of a property

interest. Now the United States asserted a property interest connected with these seals in two forms, which, although they approach each other quite closely, and to a very considerable extent depend on the same evidence and the same consideration, are yet so far distinct and separate as to deserve a separate treatment.

Those two assertions of a property interest are these. First, that the United States have a property interest in the herd of seals which frequents the Pribilof islands, and has its home and its breeding place there; and, secondly, that irrespective of any property interest which they may have in that herd, and even if it were held that they had no property interest in the herd at all, they do yet have a property interest in the industry which has been established by them on that island, of guarding and maintaining that herd, and selecting from it the annual increase for the purposes of commerce in other words, in the husbandry which is carried on by the United States on those islands.

We assert those two forms of property interest, but my discussion will be directed, in the first place, to an endeavour to support the assertion of property in its first form, that is to say, in the herd of seals itself.

Now, questions of property are extremely common in municipal jurisprudence, as we know, but they are for the most part confined to questions respecting the devolution of property, and do not touch the questions whether any particular thing or things is or are the subject of property at all. In these discussions however, what we have to consider chiefly, the question about which the principal interest is concentrated is whether these fur seals are, while they are on the high seas, the subject of property at all. The assertion on the part of Great Britain, I assume to be — indeed they so inform us in their case, counter case, and argument — that the fur seals are wild animals, animals *ferae naturæ* as the lawyers say, and that they are, therefore, not the subject of property at all. They are *res communes*, as the civilians style them, or, as they are sometimes styled, *res nullius* — a thing common to all men, or things which belong to no one man in particular.

Their contention is that while on the high sea at least, being wild animals, they are not the subject of property at all. The United States take the contrary position and assert that such is the nature and habits of these animals and such is the relation they have to these animals in breeding places that they are at all times not only while they are in the Pribilof Island, but also while upon the seas the property of the United States and property which they are entitled to defend and protect just as much as they would one of their ships that was navigating the seas.

Now my learned friend Sir Charles Russell made an observation when he was speaking upon one of the motions which were before the body to the effect that, as I understood him, property could not be established outside of municipal law, or anything in order to be held as property must have its characteristic as property rooted in municipal law. I do

not know that I am correctly stating his observation, but that is as near as I remember.

Well, that appears to be an intimation that we are obliged, in order to determine whether seals are the subject of property to recur to municipal law. But it seems to me that if we were limited to municipal law in our enquiry, we should find the greatest difficulty. Municipal law of what country? If we speak of municipal law, we must go to the municipal law of some country. Will you settle it according to the municipal law of the United States? That would indeed be a short settlement of it, for in every form and manner in which a nation has declared its policy as to property by its laws, the United States have declared the seals to be their property.

My learned friends would not agree, I apprehend, that the property in the seals should be determined by municipal law, if we are to determine it by the municipal law of the United States, and I do not know of any municipal law of Great Britain which is to the effect that seals are not property.

But, according to my view, the law according to which this question is to be determined, as indeed any question that arises between Nations, is not municipal law but international law. To be sure in respect to any particular kind of property which has a *situs* in any particular country, such as land, — any question of property in that must be determined by the municipal law of the country in which it is situate. That is true if it has a *situs*; but I suppose my learned friends would not agree with me that seals have a *situs* in the territory of the United States at all. Well, if they have not a *situs* or an admitted *situs* in the United States, then the question whether they have a *situs* there cannot be determined by any appeal to municipal law at all, but must be determined by an appeal to international law.

Now, in all this, I do not mean that municipal law in relation to property is of no importance in these discussions; on the contrary, it is of the very highest consequence that we should seek it and know just what it is, and it is, of course necessary in this discussion because it is evidence of what the law of nature is.

Now property never was created by municipal law at all; that is to say, by positive legislative exactment. Societies have not come together and created property. Property is a creation anterior to human society. Human society was created in order to defend it and support it. One of the main objects for which human society was created was the defence of the institution of property. It rests upon the law of nature and all the discussion, the whole jurisdiction respecting property as it stands in the municipal law of the civilised States of the world, is a body of unwritten law for the most part.

It is derived from the law of nature only. — In those nations where the Civil law is crystallized into the form of Codes there are no laws and no exactments which declare what shall and what shall not be the subject

of property, at least I apprehend so. Property is assumed as already existing; it stands upon the law of nature, it has been cultivated, however the question what should be property and what should not be property, what shall be the rules respecting the protection which is given to it, all of these have been questions which have been discussed for a thousand years and more in municipal law by learned tribunals. — It has been discussed in thousands and millions of different shapes and forms; and, consequently, the whole law of nature, as far as it affects the subject of property, will be found to be developed in a high degree in municipal law. — And, therefore, to that extent, I concur with my learned friend that it is highly important to investigate the municipal law upon the subject of property; and that wherever it is found universally concurring upon a given point, it may be taken as the absolute voice of the law of nature, and, therefore, of international law.

Adjourned till to-morrow morning at 11.30 o clock.

**The President.** — Will you please, Mr Carter, to continue your Argument.

**Mr Carter.** — Mr President, the point upon which I am now engaged relates to that branch of our Argument which deals with the question of the alleged property interest of the United States in the fur-seal of Alaska. I had briefly spoken yesterday to the effect that the rival contentions of the two Governments upon this subject are to be determined by international law; but that, in determining what international law was, great advantage would be found from an enquiry into what has been decided by municipal law, and by the municipal law of various Nations so far as that law shall be found to be consentaneous on this point.

The rival contentious of the two parties I should perhaps briefly repeat; that of Great Britain is that the fur-seals of Alaska are *res communes*, not the subjects of property but open to the appropriation of all mankind; and that, too, because they are wild animals. The position taken on the part of Great Britain is, in substance, that no wild animals are the subjects of property and that seals, being wild, are not the subjets of property.

The United States on the other hand insist that whether an animal is the subject of property or not depends on its nature and habits — that the terms " wild " and " tame " are descriptive of nature and habits to a certain extent but in order to determine whether any particular animal (wild or tame) is the subject of property we must so into a closer enquiry into its nature and habits, and if it be found that an animal, although commonly designated as " wild " has such nature, such habits, as enable man to deal with them substantially as he deals with domestic animals, — to establish a species of industry in respect to it, why then in respect to the question of property the same determination must be made as in the case of domestic animals and the animal must be declared to be the subject of property.

The point, therefore, upon which I insist is that in determining whether an animal, whether he is designated as wild or tame, is the subject of property or not we must institute a careful enquiry into its nature and habits; and the result of that enquiry will determine the question. In this particular, I think I am supported by the best authority. Chancellor Kent, whose authority, I am glad to say, is recognized by my barned friend on the other side, for they refer to this very passage which I am about to read to the Tribunal, says — this is page 43 of our argument :

> Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property ; but when they are abandoned or escape,